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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957 No. 947

Commonwealth of Pennsylvania, City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, Philadelphia Commission on Human Relations, William Ashe Foust and Robert Felder,

Appellants,

v.

The Board of Directors of City Trusts of the City of Philadelphia and Thirteen Substituted Trustees of the Estate of Stephen Girard, Deceased,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
I. The Testator's Will	4
II. The Operation of the Orphan Establishment	8
III. The Present Controversy	9
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. The Jurisdiction of This Court Has Been Improperly Invoked	14
A. This Court Has No Jurisdiction by Way of Appeal	14
B. The Commonwealth of Pennsylvania, the City of Philadelphia, Its Mayor and the Philadelphia Commission on Human Relations Have No Standing in This Court Either on Appeal or Certiorari	17
C. This Court Has No Jurisdiction Either by Appeal or Certiorari to Consider the Sixth Question Presented by Appellants	18
II. No Substantial Federal Question Is Presented Which Would Warrant the Grant of Certiorari	19

PAGE

A. The Decision of the Pennsylvania Supreme Court on Questions of State Law Rests on a Fair and Substantial Basis and Should Be Accepted by This Court 19

1. The Ruling as to the Primary Object of the Testator's Bounty Was Completely Sound 20

2. In Removing the City as Trustee the Pennsylvania Court Was Exercising Its Historic Equitable Power 22

B. Stephen Girard's Orphan Establishment Is a Private Charitable Institution and Has Not Become a Public School 24

1. The Uncontroverted Facts Establish the Private Status of Girard College 27

2. No Legislation Did or Could Make Girard College a Public Institution 29

3. The Limited Tax Exemption Enjoyed by Girard College Is Granted to All Private Charities 35

4. The City's Trusteeship Did Not and Could Not Transform Girard College into Public or Municipal Property 36

C. The Enforcement of the Primary Purpose of Stephen Girard's Will by the Removal of the City of Philadelphia as Trustee of the Girard College Trust Does Not Violate the Fourteenth Amendment 39

1. The Effect of This Court's Prior Decision 40

2. The Principle of *Shelley* v. *Kraemer* Does Not Support Appellants' Position 43

PAGE

(*a*) Individual Appellants as Citizens Have No Rights in the Estate of Stephen Girard 43

(*b*) The Removal of the City as Trustee Conferred on Individual Appellants No Rights in the Estate of Stephen Girard 45

CONCLUSION 48

APPENDIX A. Will of Stephen Girard 51

APPENDIX B. Pennsylvania Act of March 24, 1832, P. L. 176 (1831–1832 Volume) 85

Table of Citations

CASES:

Bailey *v.* Anderson, 326 U. S. 203 (1945) 15

Barrows *v.* Jackson, 346 U. S. 249 (1953) 41, 43, 44, 46

Bilby *v.* Stewart, 246 U. S. 255 (1918) 25

Book's Estate, 297 Pa. 543, 147 A. 608 (1929) 31

Bourd *v.* Berman, 359 Pa. 183, 58 A. 2d 442 (1948) 15

Braxton County Court *v.* West Virginia, 208 U. S. 192 (1908) 18

Broad River Power Co. *v.* South Carolina, 281 U. S. 537 (1930) 19

Brown *v.* Board of Education, 347 U. S. 483 (1954) 41, 42, 48

Brown *v.* Hummel, 6 Pa. 86 (1847) 26, 27

Burd Orphan Asylum *v.* School District of Upper Darby, 90 Pa. 21 (1880) 35

Burns Estate, 2 Pa. D. & C. 2d 579 (O. C. Phila. 1955) 32

PAGE

City of Greensboro *v.* Simkins, 246 F. 2d 425 (4 Cir. 1957) 47

Collins *v.* Hardyman, 341 U. S. 651 (1951) 45

Demorest *v.* City Bank Co., 321 U. S. 36 (1944) 20

Dougherty Adoption Case, 358 Pa. 620, 58 A. 2d 77 (1948) 31

Enders *v.* Enders, 164 Pa. 266, 30 A. 129 (1894) 31

Girard *v.* Philadelphia, 7 Wall. 1 (1868) 22, 24, 37

Girard College Trusteeship, 391 Pa. 434, 138 A. 2d 844 (1958) 2, 11, 21

Girard Estate, 4 Pa. D. & C. 2d 671 (1955), 4 Pa. D. & C. 2d 708 (1956) 2

Girard Estate, 7 Fiduc. Rep. (Pa.) 555 (1957) 2, 18

Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956) ..2, 9, 21, 42

Hill School Tax Exemption Case, 370 Pa. 21, 87 A. 2d 259 (1952) 35

Holmes *v.* City of Atlanta, 350 U. S. 879 (1955) 41, 47

Irving Trust Co. *v.* Day, 314 U. S. 556 (1942) 20

James *v.* Bowman, 190 U. S. 127 (1903) 45

Kerr *v.* Enoch Pratt Free Library, 149 F. 2d 212 (4 Cir., *cert. den.*, 326 U. S. 721 (1945) 37

Lawrence *v.* Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948) 47

Mager *v.* Grima, 8 How. 490 (1850) 19

Maxwell *v.* Bugbee, 250 U. S. 525 (1919) 20

Mayor of Baltimore *v.* Dawson, 350 U. S. 877 (1955) 47

Muir *v.* Louisville Park Theatrical Ass'n, 347 U. S. 971 (1954), *vacating* 202 F. 2d 275 (6 Cir. 1953) 47

Nickel *v.* Cole, 256 U. S. 222 (1921) 25

Oklahoma *ex rel.* Johnson *v.* Cook, 304 U. S. 387 (1938) 18

Pennsylvania *v.* Board of Directors of City Trusts, 353 U. S. 230, rehearing denied, 353 U. S. 989 (1957) 2, 9, 10

PAGE

Philadelphia *v.* Fox, 64 Pa. 169 (1870) 26
Philadelphia *v.* Girard's Heirs, 45 Pa. 9 (1863) 22
Pierce *v.* Society of Sisters, 268 U. S. 510 (1925) 48
Railway Employes' Dept. A. F. L. *v.* Hanson, 351 U. S. 225 (1956) 46
Rice *v.* Elmore, 165 F. 2d 387 (4 Cir. 1947), *cert. den.*, 333 U. S. 875 (1948) 47
Rockhold *v.* Rockhold, 92 U. S. 129 (1875) 25
Shelley *v.* Kraemer, 334 U. S. 1 (1948) 41, 43, 44, 46
Smith *v.* Allwright, 321 U. S. 649 (1944) 47
Soohan *v.* Philadelphia, 33 Pa. 9 (1859) 22
Stevens's Estate, 200 Pa. 318, 49 A. 985 (1901) 16
Strauder *v.* West Virginia, 100 U. S. 303 (1879) 42
Tate *v.* Department of Conservation and Development, 133 F. Supp. 53 (E. D. Va. 1955), *aff'd per curiam*, 231 F. 2d 615 (4 Cir. 1956) 47
Terry *v.* Adams, 345 U. S. 461 (1953) 47
Trenton *v.* New Jersey, 262 U. S. 182 (1923) 18
Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819) 27, 38, 48
United States *v.* Cruikshank, 92 U. S. 542 (1875) 45
United States *v.* Harris, 106 U. S. 629 (1882) 45
United States *v.* Perkins, 163 U. S. 625 (1896) 20
Vicksburg *v.* Henson, 231 U. S. 259 (1913) 34
Vidal *v.* Girard's Executors, 2 How. 127 (1844) 22, 23, 30, 36, 37
Williams *v.* Masters, Mates & Pilots, 384 Pa. 413, 120 A. 2d 896 (1956) 15
Williams *v.* Mayor and City Council of Baltimore, 289 U. S. 36 (1933) 18
Wilson *v.* Board of Directors of City Trusts, 324 Pa. 545, 188 A. 588 (1936) 32, 33, 36

Table of Authorities Cited

UNITED STATES CONSTITUTION: PAGE

Fourteenth Amendment 4, 10, 14, 17, 22, 39-46

UNITED STATES STATUTES:

28 U. S. C. § 1257(2) 1, 2, 3, 13, 14, 17

28 U. S. C. § 1257(3) 4, 17

28 U. S. C. § 2103 2

PENNSYLVANIA STATUTES:

Act of March 29, 1787, 12 Pa. Stat. at Large 479 39

Act of March 24, 1832, P. L. 176 ..... 30, 31

Act of April 4, 1832, P. L. 275 30

Act of February 27, 1847, P. L. 178, 53 Purd. Pa. Stat. §§ 16339-16344 ..... 31, 32

Act of April 20, 1853, P. L. 624, § 6, 53 Purd. Pa. Stat. § 16345 31

Act of June 30, 1869, P. L. 1276, 53 Purd. Pa. Stat. §§ 16365-16370 ..... 8, 32, 33, 34

Act of May 23, 1887, P. L. 168, 43 Purd. Pa. Stat. § 81. 31

Act of June 17, 1913, P. L. 507, § 1, as amended, 72 Purd. Pa. Stat. § 4821 35

Act of May 23, 1949, P. L. 1676, § 2, as reenacted and amended, 24 Purd. Pa. Stat. § 581.32 35

Fiduciaries Act of 1949, April 18, P. L. 512, § 331(5), 20 Purd. Pa. Stat. § 320.331(5) 14, 15, 16, 17

Philadelphia Home Rule Charter, Section 6-400(c) ... 33

Title 24, Purdon's Pennsylvania Statutes 34

MISCELLANEOUS: PAGE

10 McQuillin, Municipal Corporations (3d ed. 1950):
§ 28.25 36
§ 28.36 37

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed.), § 66 15

Rules of the Supreme Court of the United States:
15(c) (1), 40(d) (2) 22

Statistical Abstract of the United States (1953 ed.), p. 119 39

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Commonwealth of Pennsylvania, City of Philadelphia, Richardson Dilworth, Mayor of the City of Philadelphia, Philadelphia Commission on Human Relations, William Ashe Foust and Robert Felder,

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v.

The Board of Directors of City Trusts of the City of Philadelphia and Thirteen Substituted Trustees of the Estate of Stephen Girard, Deceased,

Appellees.

MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the final judgment and decree of the Supreme Court of Pennsylvania be dismissed on the ground that the judgment below cannot be appealed to the Supreme Court of the United States under 28 U. S. C. § 1257(2), and on the further ground that no substantial federal question is presented. Since this Court is required

by 28 U. S. C. § 2103 to treat the appeal as a petition for certiorari, appellees request the Court to deny the petition on the ground that the case does not present a federal question of substance.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in the present appeal (J.S. 39)[1] is reported as *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958). The opinions and orders of the Orphans' Court of Philadelphia County are reported as *Girard Estate*, 7 Fiduc. Rep. (Pa.) 555, 606-610 (1957).

The opinions of the Pennsylvania courts in the prior appeal to this Court are as follows: opinion of the Supreme Court of Pennsylvania, *Girard Will Case*, 386 Pa. 548, 127 A. 2d 287 (1956); opinions of the Orphans' Court, *Girard Estate*, 4 Pa. D. & C. 2d 671 (1955), 4 Pa. D. & C. 2d 708 (1956). The opinion of this Court on the prior appeal, reversing the judgment of the Supreme Court of Pennsylvania, is reported as *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230, rehearing denied, 353 U. S. 989 (1957).

JURISDICTION.

This Court has no jurisdiction by way of appeal under 28 U. S. C. § 1257(2) for the reason that the validity of a state statute was not drawn in question on the ground

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[1] "J.S." herein refers to appellants' Jurisdictional Statement on this appeal.

"J.R." herein refers to the Joint Record of appellants in the Supreme Court of Pennsylvania.

"App." herein refers to the Appendices attached to this Motion and Brief.

of its being repugnant to the Constitution of the United States and for the reason that there was no decision in the Pennsylvania courts in favor of the constitutional validity of a state statute.

This Court should also refuse jurisdiction by way of certiorari in view of the fact that there is no federal question of substance presented.

STATUTE INVOLVED

There is no statute involved in the present case. The Board of Directors of City Trusts was removed as trustee of the Girard College trust by an exercise of the inherent chancery powers of the Orphans' Court.

No alleged constitutional rights of the appellants were denied by the application or construction of any state statute.

The statutes cited by appellants relating to the administration of Girard College by the City of Philadelphia (J.S. 7-8) were neither required nor requested by the Will of Stephen Girard, and therefore have no place in the consideration of questions which involve the enforcement of the terms of that Will.

QUESTIONS PRESENTED.

1. Whether the appeal jurisdiction of this Court under 28 U. S. C. § 1257(2) is properly invoked where a state court pursuant to its historic nonstatutory powers removed a trustee who was unable to carry out the terms of a testamentary trust and the constitutional validity of the state statute allegedly involved was not raised in the lower state court.

2. Whether a substantial federal question is presented, warranting the grant by this Court of a petition for writ

of certiorari under 28 U. S. C. § 1257(3), where a state court removed, as trustee of a testamentary trust for the operation of a private school and orphanage for poor white male orphans, a city agency which this Court had held could not constitutionally administer the trust as directed by the testator.

3. Whether a substantial federal question is presented, warranting the grant by this Court of a petition for writ of certiorari under 28 U. S. C. § 1257(3), by the allegation that such a school and orphanage is a public institution subject to the restrictions of the Fourteenth Amendment, notwithstanding the amply supported findings of the state court that:

(*a*) the testator intended to establish a private charity;

(*b*) no legislation was requested by the testator or required for the fulfillment of his charitable purpose;

(*c*) the school and orphanage was built and has been maintained solely with the testator's funds;

(*d*) the school and orphanage is no different from any other private school.

STATEMENT OF THE CASE.

I. The Testator's Will.

Stephen Girard died on December 26, 1831, leaving a Will dated February 16, 1830, and two Codicils, respectively dated December 25, 1830 and June 20, 1831, copies of which documents will be found in Appendix A hereto, pages 51-84.

In making his testamentary gifts, Girard carefully differentiated between (*a*) public schools and private schools, (*b*) different races, and (*c*) outright gifts and

gifts in trust. Thus, in Clause I he gave his "black woman Hannah" her freedom and provided for the payment to her of $200 per year from the income of another gift. In Clause IV he made an *outright* gift of $10,000 to "the Comptrollers of the *public* schools for the city and county of Philadelphia" for use in one of the public school systems.[2] In Clause V he gave $10,000 to the City of Philadelphia *in trust* to use the income to purchase fuel for distribution among "poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia."

In Clause VIII Girard gave $6,000 to trustees to purchase a suitable piece of ground and erect thereon a school partly for "poor male white children" and partly for "poor female white children" of Passyunk Township. In further clauses he conferred benefactions upon his relatives and other individuals, some by way of outright legacies and others in the form of trusts.

In Clause XIX he gave Louisiana property to the City of New Orleans, the proceeds to be used "to promote the health and general prosperity of the inhabitants of the City of New Orleans," but in the same paragraph directed that other Louisiana property and its proceeds should be held by the City of Philadelphia *in trust* for "the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate."

This brought Girard to what he specifically called his "primary object"—the creation of an orphan establishment for poor white male orphans. In Clause XX of his Will, therefore, he recited his desire "to provide for such a number of poor male white orphan children, as can be trained in one institution, *a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds,*" and to this end devised his entire residuary estate to "The Mayor, Alder-

[2] Emphasis in Will is supplied.

men and Citizens of Philadelphia" (the then corporate name of the City), their successors and assigns, *in trust* for the purposes thereafter mentioned.

In Clause XXI he then directed that $2,000,000 of this trust fund be used to erect a "college" on his square of ground between High and Chestnut Streets and 11th and 12th Streets, in the City of Philadelphia. (By his second codicil the location was changed to a site which he had later purchased and on which the college was erected.) In the same Clause he (*a*) described the physical aspects of the building in great detail and provided for the selection and qualifications of a competent number of instructors, teachers, assistants and other necessary agents; (*b*) declared that as many poor white male orphans, between the ages of six and ten years as the residuary income should be adequate to maintain, should be admitted into the college, preference being given first to orphans born in the City of Philadelphia, secondly, to those born in any other part of Pennsylvania, thirdly, to those born in the City of New York, and lastly, to those born in the City of New Orleans; (*c*) provided that no orphan should be admitted until his guardian or other competent authority had, by indenture, relinquishment or otherwise, authorized the City or others appointed by it to enforce every proper restraint and to prevent relatives or others from interfering with or withdrawing such orphan from the institution; (*d*) provided that the orphans admitted into the college should be "there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner;" (*e*) stipulated that due regard was to be paid to their health, and that they were to have suitable exercise and recreation; (*f*) prescribed in detail the nature of the curriculum in which they should be instructed; (*g*) directed that scholars meriting it should remain in the college until they were fourteen to eighteen years old, after which they were to be bound out by or under the

City's direction to suitable occupations; and (*h*) enjoined that no ecclesiastic should ever hold or exercise any station or duty or be admitted to the premises.

Having also declared in Clause XX that, together with the provision for the poor male white orphans, he had sincerely at heart the welfare of the City of Philadelphia, and, as a part of it, was desirous of improving the neighborhood of the river Delaware, Girard bequeathed in Clause XXII, out of the residue of his personal estate, the sum of $500,000 in trust to pave Delaware Avenue and Water Street and to make certain other improvements in that part of the city. This clause suggested that the City obtain legislation in order to carry out these contemplated City improvements:

In Clause XXIII, $300,000 was bequeathed to the Commonwealth of Pennsylvania for internal improvement by canal navigation, conditioned upon the enactment of laws "to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified;" *i.e.*, the paving of Delaware Avenue, etc.

In Clause XXIV Girard left the remainder of his residuary estate *in trust:* to apply the income to the further improvement and maintenance of the college, to enable the city to provide for a competent police force, and to improve the property and general appearance of the city. He stated that "To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing for the College as hereinbefore directed, *as my primary object.*"

Girard also provided in Clause XXIV that if the city "shall knowingly and wilfully violate any of the conditions" in the Will, the said remainder of the residue should pass to the Commonwealth of Pennsylvania for the purposes of internal navigation, except that the income

from his real estate in the City and County of Philadelphia was to be forever applied to the maintenance of the college; and if the Commonwealth failed to apply this bequest and the prior bequest of $300,000 to the purposes mentioned, or failed "to pass the laws hereinbefore specified for promoting the improvement of the City of Philadelphia," the said remainder (subject to the same exception in favor of the college) should pass to the United States of America for the purposes of internal navigation. There was a provision in the same clause that the City should keep separate accounts of the trust funds, which were not to be used for any but the prescribed purposes; should furnish an annual report thereof to the legislature; and should publish annually in newspapers a concise account of the trusts and the condition of the college.

II. The Operation of the Orphan Establishment.

From the death of Stephen Girard until 1869, the trust estate was administered by the City of Philadelphia as trustee. By the Act of June 30, 1869, P. L. 1276 (53 Purd. Pa. Stat. §§ 16365-16370), the Board of Directors of City Trusts was established consisting of the Mayor, the Presidents of City Councils and twelve private citizens, none of whom received compensation. The administration of all trusts held by the City, including the trust for Girard College, was delegated by that Act to the Board, which has administered the trusts since that time.

The College was opened on January 1, 1848. It has been conducted in conformity with the purposes expressed in Girard's Will. Neither the State nor the City of Philadelphia nor any other public body has contributed any money or property for the support of the College. The Trustees of the College choose the teachers as well as all other persons in the management and operation of the trust estate, in conformity with the requirements of of Girard's Will. All expenses of whatsoever character

incurred in connection with the operation and maintenance of the College are paid exclusively from the trust fund set up by Girard. The employees of the trust are not employees of the City or of the public school district but of the trust estate alone. The public school authorities have no voice in the management of the College and orphan establishment.

III. The Present Controversy.

The present controversy had its origin in 1954, when the appellants filed petitions in the Orphans' Court of Philadelphia to compel the Board of Directors of City Trusts to admit the individual appellants, Foust and Felder, to Girard College. After lengthy hearings before the auditing judge he; and later the Orphans' Court *en banc,* dismissed the petitions, holding that to grant them would violate the express terms of Stephen Girard's Will. They stated that if the trustee City, acting through the Board of Directors of City Trusts, could not constitutionally carry out the terms of the trust for "poor white male orphans," as directed in the Will, then substituted trustees should be appointed who could carry out this primary object of the testator. 4 Pa. D. & C. 2d 671, 701-702 (1955); 4 Pa. D. & C. 2d 708, 714-715 (1956).

The Supreme Court of Pennsylvania affirmed; and it, too, explicitly stated that if the Board of Directors of City Trusts could not constitutionally carry out the terms of the trust for "poor white male orphans," then substituted trustees should be appointed who could so do. *Girard Will Case,* 386 Pa. 548, 566-568, 127 A. 2d 287, 295-296 (1956).

An appeal to this Court from the decision of the Supreme Court of Pennsylvania was dismissed; but, treating it as a petition for certiorari, this Court granted the petition and reversed and remanded the cause for further proceedings not inconsistent with its opinion. *Pennsylvania* v. *Board of Directors of City Trusts,* 353 U. S. 230 (1957). This Court held that the Board of Directors

of City Trusts was an agency of the Commonwealth of Pennsylvania and that therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the College because they were Negroes was discrimination by the State, forbidden by the Fourteenth Amendment. A petition for rehearing and presentation of oral argument was thereafter denied by this Court (*Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 989). On June 11, 1957 the Court issued its formal mandate, reversing the judgment of the Pennsylvania Supreme Court for the reason stated and remanding the cause for further proceedings not inconsistent with the Court's opinion (J.R. 79a).

On June 28, 1957 the Supreme Court of Pennsylvania entered an order vacating the earlier decrees of the Orphans' Court and remanded the cause to that court for further proceedings not inconsistent with the opinion of this Court (J.R. 44a). Mr. Justice Bell dissented, being of the opinion that the cause should have been remanded to the Orphans' Court with directions to remove the Board as trustee and appoint substituted trustees who would not be officers or employees of the Commonwealth, the City, or any agency thereof (J.R. 45a). Mr. Justice Musmanno dissented on the ground that in his opinion the mandate of this Court required that Foust and Felder should be forthwith admitted to Girard College (J.R. 49a).

Almost two months having thereafter elapsed without application by appellants for additional proceedings, the Orphans' Court on September 11, 1957 filed a further opinion and entered a further decree (J.R. 50a, 53a). In obedience to the mandate of this Court dated June 11, 1957 and the order of the Pennsylvania Supreme Court filed June 28, 1957, and in conformity with the Pennsylvania Supreme Court's suggestions with respect to removal contained in its opinion on the prior appeal, the Orphans' Court dismissed the petitions of Foust and Felder for admission to Girard College, removed the Board

of Directors of City Trusts as trustee upon appointment of a substituted trustee, directed the Board to transfer the records and assets of the estate to the substituted trustee when appointed and qualified, and ordered the Board to file an account of its administration of the estate within six months. 7 Fiduc. Rep. (Pa.) 555 (1957).

Appellants then filed petitions with the Orphans' Court asking reconsideration, vacation or modification of the decree of September 11, 1957, and praying that Foust and Felder be admitted to the College (J.R. 55a-73a). On October 4, 1957 the Orphans' Court entered further opinions and decrees denying these petitions (J.R. 74a-76a). At the same time it entered a decree appointing thirteen individuals as substituted trustees (J.R. 77a). The latter decree directed the substituted trustees to serve without compensation, appointed them for a period of three years or until such time as their successors should be appointed, and directed that those who were members of the Board of Directors of City Trusts should resign therefrom.

The appellants thereupon appealed to the Supreme Court of Pennsylvania from the Orphans' Court decrees of September 11, 1957 and October 4, 1957. The Supreme Court of Pennsylvania affirmed those decrees, Mr. Justice Musmanno dissenting. *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958). In the course of its opinion, written by Mr. Chief Justice Jones, the Court held (*a*) that a testator has a constitutional right of property in the execution of his testamentary benefaction, and to deprive him thereof by appropriating a part of the gift to a purpose or person not intended would be a fraud on his generosity and an evasion of his private dominion; (*b*) that the orphanage as a private charity, not the trusteeship of the City, constituted the primary object of Girard's testamentary plan; (*c*) that the trust and the orphanage are private, not public; (*d*) that the statutes and ordinances which were urged by the appellants as

having made the trust a public one did not so operate, but were gratuitous, unnecessary enactments; (*e*) that the Orphans' Court acted within its inherent non-statutory chancery powers in removing the Board as trustee and substituting private individuals as trustees in order to carry out the testator's charitable object; (*f*) that the removal of the Board and the denial of individual appellants' petitions did not deprive them of any constitutionally guaranteed right; and (*g*) that appellants had not been denied due process of law.

On February 12, 1958, the Supreme Court of Pennsylvania denied appellants' petition for reargument. This appeal followed.

SUMMARY OF ARGUMENT.

This case involves the interpretation and enforcement of the Will of Stephen Girard, whereby he bequeathed certain property in trust to the City of Philadelphia to establish and maintain an orphan establishment for a named beneficiary class. Following the decision of this Court that the City as trustee could not constitutionally carry out the terms of the Will as directed, the Orphans' Court, under its historic equity powers, removed the City as trustee and appointed new trustees who were not under such an incapacity. The Orphans' Court further denied petitions for admission of the individual appellants because they were not within the beneficiary class named in the Will.

The beneficiary class so named is "poor male white orphans"; the individual appellants are poor male Negro orphans. For this reason, appellants have attempted to label this proceeding a "segregation" or "discrimination" case. They continue to do so in their Jurisdictional Statement to this Court, despite the Pennsylvania Supreme Court's statement that such labels can only serve to confuse and obscure the real issues involved (J. S. 41). Ap-

pellees submit that this case is not a "segregation" case but is purely a case involving the law of testamentary dispositions and charitable trusts and that the decisions of the Pennsylvania courts are fully and firmly grounded in state law.

Appellants' Jurisdictional Statement misstates, obscures and confuses the facts and issues which are presented to this Court. Appellees, believing that in a case such as this the starting point should be the Will which is under attack, have at the outset in their Statement of the Case summarized the pertinent portions of the Will and have appended the entire Will as Appendix A. An examination of the Will reveals many of the errors in appellants' statements.

The attempt to invoke this Court's jurisdiction by way of appeal is improper in view of the fact that the requirements of 28 U. S. C. § 1257(2) have not been met. The constitutional validity of a state statute was not raised in the Orphans' Court, and there was no decision in either Pennsylvania court in favor of the constitutional validity of a state statute, since the removal of the trustee was based on the inherent and historic equity powers of the Orphans' Court. Moreover, the alleged federal question presented to this Court arises not from the removal of the Board as trustee but from the dismissal of the petitions for admission of the individual appellants, which was based not upon statute but upon the Will of Stephen Girard.

In addition to the improper invocation of jurisdiction by way of appeal, the Commonwealth of Pennsylvania and the City of Philadelphia and its agencies have no standing in this Court to assert the alleged rights of the individual appellants and should therefore be eliminated from the proceeding. Likewise, appellants have no standing to present the sixth question in their Jurisdictional Statement (J. S. 11) raising the interests of the United States. That question was not considered by the Pennsylvania courts and is not ripe for decision at this time.

The petition for certiorari, which appellants request in the alternative, should be denied by this Court for want of a substantial federal question. The Pennsylvania Supreme Court decided the following questions of state law: (1) the primary and dominant object of Girard's Will is the college and orphan establishment for poor male white orphans, not the trusteeship of the City of Philadelphia; (2) the Orphans' Court has complete power and jurisdiction to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed; (3) Girard College is a private charity, no legislation was requested or required to establish or administer it, and none could transform it into a public institution. These nonfederal grounds of decision should be accepted by this Court because they have fair and substantial support and were not made to evade any constitutional issue.

Finally, the enforcement by the Pennsylvania courts of the primary purpose of Girard's Will, thereby protecting the rights of the named beneficiary class, did not deny any rights of the individual appellants under the Fourteenth Amendment. The attempt by appellants to represent this case as an "unwitting blueprint" for evasion of the Fourteenth Amendment is completely without foundation. Girard College is not a public school. It is a private charity established and administered according to the will of a private individual, and maintained and supported entirely by private funds.

ARGUMENT.

I. The Jurisdiction of This Court Has Been Improperly Invoked.

A. This Court Has No Jurisdiction by Way of Appeal.

Appellants invoke the jurisdiction of this Court by way of appeal under 28 U. S. C. § 1257(2), alleging that the validity of Section 331(5) of the Fiduciaries Act of

1949, April 18, P. L. 512, § 331(5), 20 Purd. Pa. Stat. § 320.331(5) was drawn in question on the ground of its being repugnant to the Constitution of the United States and that the decision of the Pennsylvania courts was in favor of its validity.

This Court has no jurisdiction by way of appeal for the reason that the constitutional validity of the Fiduciaries Act of 1949 was not raised by any of the appellants in their Petitions for Reconsideration and Vacation or Modification before the Orphans' Court (J.R. 55a-73a). Although the individual appellants did attempt to raise this question in the Statement of Questions Involved in their brief before the Pennsylvania Supreme Court, that court made no express ruling on the constitutionality of the Act. Such a ruling was unnecessary in view of the settled state practice that questions not raised in the court below will not be considered on appeal. See, *e.g., Williams* v. *Masters, Mates & Pilots,* 384 Pa. 413, 421, 120 A. 2d 896, 900 (1956); *Bourd* v. *Berman,* 359 Pa. 183, 185, 58 A. 2d 442, 444 (1948). In view of the untimely presentation of this question to the Pennsylvania courts, this Court should dismiss the appeal for lack of jurisdiction. *Bailey* v. *Anderson,* 326 U. S. 203, 206-207 (1945); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1951 ed.), § 66.

Furthermore, the Pennsylvania courts found it unnecessary to make any decision on the constitutional validity of the Fiduciaries Act of 1949. The Orphans' Court in its opinion and decree of September 11, 1957 (J.R. 50a-54a) did not base its action on any statute but said:

> "It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement—the trustee must be fitted to

> the trust and not the trust to the trustee. We know of no decision of any court in the English-speaking world which challenges this rule of law. As a matter of fact, the Supreme Court of the United States, on two previous occasions in litigation dealing with the estate of the present testator, clearly indicated its adherence to this principle."

The Pennsylvania Supreme Court did refer to Section 331(5) of the Fiduciaries Act of 1949, in discussing the powers of the Orphans' Court (J.S. 47). However, it immediately went on to state as follows (*id.*):

> "*Over and above such statutory power,* it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate,* 200 Pa. 318, 322, 49 A. 985." (Emphasis supplied.)

The case of *Steven's Estate,* decided in 1901, set forth the inherent equity powers of the Orphans' Court with such clarity that the Supreme Court found it "presently so pertinent" as to justify quoting from it at length (J.S. 47-48).

The decisions of the Pennsylvania courts were therefore based upon a nonstatutory ground, not upon the statute which the appellants attempted to insinuate into this case for the first time in the Pennsylvania Supreme Court. There was no decision, nor was there any necessity for a decision, in favor of the validity of the Fiduciaries Act of 1949.

There are additional reasons why this Court has no jurisdiction by way of appeal. In the first place, the mere removal of the Board of Directors of City Trusts did not operate to deny any alleged constitutional rights of the individual appellants. Rather was it the dismissal by the Orphans' Court (J.R. 54a) of the individual appellants' petitions for admission to Girard College which provided

the occasion for them to allege the existence of the federal questions which they now urge upon this Court. That dismissal was not based upon any statute but upon the express terms of Stephen Girard's Will.

Further, appellants' position that the appeal should be entertained because they contend that the Fiduciaries Act of 1949 is involved in this proceeding extends far beyond the cases cited in their Jurisdictional Statement (J.S. 5-6), wherein appeals were allowed because the constitutional validity of a state statute as applied was raised and decided. In the last analysis virtually every decision by a state court is based upon some statute which gives the court authority to hear and decide an issue presented to it. If appellants' argument with respect to Section 331 of the Fiduciaries Act of 1949 were accepted by this Court, it would follow that most state court decisions, in which rights under the Fourteenth Amendment are raised, could properly come before this Court on appeal. Appellants' argument would, therefore, obliterate the distinction made by Congress between appeal and certiorari in Sections 1257(2) and 1257(3), 28 U. S. C.

B. The Commonwealth of Pennsylvania, the City of Philadelphia, Its Mayor and the Philadelphia Commission on Human Relations Have No Standing in This Court Either on Appeal or Certiorari.

The questions presented by appellants (J.S. 10-11), with the exception of the sixth question which will be discussed hereafter, are concerned solely with the alleged violation of the constitutional rights of the individual appellants by the refusal of the Orphans' Court to order their admission to Girard College. Whatever the status of the Commonwealth of Pennsylvania and the City of Philadelphia and its agencies may have been in the Pennsylvania courts with respect to the questions of state law decided there, no federal rights of these parties have been,

asserted in their Jurisdictional Statement, nor could such rights be successfully asserted.[3] This Court has held time and again that a party before this Court must have a direct personal interest in the federal question presented. See, *e. g.*, *Braxton County Court* v. *West Virginia*, 208 U. S. 192 (1908); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938). It is respectfully submitted that the above named parties should be eliminated from this proceeding.

C. This Court Has No Jurisdiction Either by Appeal or Certiorari to Consider the Sixth Question Presented by Appellants.

The sixth question presented by appellants (J.S. 11) raises the issue as to whether the appointment of new trustees impairs the rights of the United States under the residuary clause of the Will (Clause XXIV, App. 76). The injection of this question into the present case is completely without merit. The appellants have no standing to assert rights of the United States, nor did they properly present this question to the Pennsylvania Supreme Court for decision. Indeed, the Commonwealth of Pennsylvania, whose successor interest is prior to that of the United States, categorically stated in that court that the interest of the Commonwealth is not at issue in the present proceeding (Answer of Appellees to Appellants' Joint Petition for Reargument, pp. 7-8). As was said by the Orphans' Court in deferring action on the Commonwealth's petition with respect to its successor interest:

> "Under our well-established practice all such questions are heard at the audit of the fiduciary's account. Therefore, this petition is premature." *Girard Estate*, 7 Fiduc. Rep. (Pa.) 609, 610 (1957).

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[3] See *Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36, 40 (1933); *Trenton* v. *New Jersey*, 262 U. S. 182 (1923).

For these reasons, the raising of this issue is frivolous, and this Court has no jurisdiction to consider it.

II. No Substantial Federal Question Is Presented Which Would Warrant The Grant of Certiorari.

A. The Decision of the Pennsylvania Supreme Court on Questions of State Law Rests on a Fair and Substantial Basis and Should Be Accepted by This Court.

Appellants' argument obscures the questions which are presented to this Court for decision. In order to place these questions in their proper perspective, the questions of state law which have been decided by the Pennsylvania Supreme Court must be examined. Such an examination demonstrates the constitutional propriety of the decision.

This Court has stated many times that it will accept the state law announced by the state court unless it is made to evade a constitutional issue or is without a fair or substantial basis. In *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540 (1930), the Court said:

> "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. * * * But if there is no evasion of the constitutional issue, * * *; and the non-federal ground of decision has fair support, * * * this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

This principle has been particularly recognized by this Court in the area of the regulation by the State of the manner and terms upon which property within its domain may be transmitted by will and the determination of who shall or who shall not be capable of taking. *Mager* v. *Grima*, 8 How. 490 (1850); *accord*, *United States* v. *Perkins*, 163 U. S. 625, 627, 628 (1896); *Maxwell* v. *Bugbee*, 250 U. S. 525, 536 (1919); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942); *Demorest* v. *City Bank Co.*, 321 U. S. 36 (1944).[4]

In the light of the above principle, the following questions of state law decided by the Pennsylvania Supreme Court should be controlling in this Court, since they were not made to evade a constitutional right and they clearly have fair and substantial—indeed impregnable—support.

1. *The Ruling as to the Primary Object of the Testator's Bounty Was Completely Sound.*

The primary and dominant object of Stephen Girard's Will is the college and orphan establishment for "poor male white orphans" and not the trusteeship of the City of Philadelphia (J.S. 44). This proposition has clear support in the language of the Will and in cases decided by

[4] The last cited case involved an appeal from a New York decision passing upon the state Personal Property Law dealing with the apportionment of proceeds of a salvage operation between life tenant and remaindermen. Mr. Justice Douglas, with whom Mr. Justice Black joined, concurred on the ground that the appeal should have been dismissed at the outset, stating (321 U. S. at 49):

> "That is a question of New York law on which the New York court has the final say. It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous. *Sauer* v. *New York*, 206 U. S. 536, 545-548. And there is no suggestion here that state law has been manipulated in evasion of a federal constitutional right. *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 657; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540. Consequently I can see no possible claim to substantiality of any federal question, whatever view may be taken of the due process clause. I would therefore dismiss the appeal."

this Court and the Pennsylvania Supreme Court dating back to 1844.

As to the terms of the Will itself, the testator clearly declared his dominant object. Clause XX of the Will (App. 61) recites, as an introduction to the devise of his residuary estate to support the trusts mentioned in the Will,

> "• • • I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds • • •."

In Clause XXI of the Will (App. 72), after contemplating that the sum of $2,000,000 might not be sufficient to build the buildings and support the college, he directed that such further sums as may be necessary shall be taken from the final residuary fund, his design and desire being

> "that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate."

In Clause XXIV (App. 77) the City is given an interest in the income from the residuary trust

> "• • • after providing for the College as hereinbefore directed, as my primary object."

Obviously, with the express intent of the testator so clearly set forth, the primary object specified has been fully recognized by this Court and by the courts of Pennsylvania. *Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958); *Girard Will Case*, 386 Pa. 548, 568, 127 A. 2d 287, 296 (1956). The views expressed in those opinions were merely confirmatory of previous decisions.

In *Girard* v. *Philadelphia*, 7 Wall. 1, 12 (1868), Mr. Justice Grier, speaking for this Court, said:

> "• • • that the income of the whole residuary was devoted to the three objects stated by the testator, the college being the 'primary object,' and that so long as any portion of this residuary fund should be found necessary for 'its improvement and maintenance,' on the plan and to the extent declared in the will, the second and third objects could claim nothing."

See also *Vidal* v. *Girard's Executors*, 2 How. 127, 188 (1844).

The same recognition has been given to the primary purpose of the testator by the Pennsylvania courts. *Soohan* v. *Philadelphia*, 33 Pa. 9, 22 (1859); *Philadelphia* v. *Girard's Heirs*, 45 Pa. 9, 25 (1863).

2. *In Removing the City as Trustee the Pennsylvania Court Was Exercising Its Historic Equitable Power.*

The Orphans' Court has complete power and jurisdiction to remove a trustee who is incapable or fails or refuses to carry out a trust as its creator directed.[5] In

[5] Appellants intimate that the order of the Orphans' Court deprived them of procedural due process in violation of the Fourteenth Amendment (J. S. 21). In view of the fact that this allegation has not been included in the Questions Presented (J. S. 10-11), it is not properly before this Court for consideration. Rules 15(c)(1), 40(d)(2). The elimination of this issue from the Questions Presented (see Notice of Appeal, p. 4) is clear evidence that it has no substantial merit. However, in order to avoid any misapprehension on the part of this Court, it should be noted that the Pennsylvania Supreme Court expressly stated in its opinion (J. S. 55) that "the parties have been fully heard," referring to the extensive testimony taken before the Orphans' Court and the exceptions, arguments and other procedural steps allowed the appellants at every stage of the case. See Answer of Appellees to Appellants' Joint Petition for Reargument, pp. 1-5.

The appellants state that no party to the litigation had requested or ever suggested that the City of Philadelphia should be ousted as trustee—especially of the entire Estate (J.S. 36). The record shows, however (Cert. Tr. 65—oral argument before Bolger, *J.*) that the then City Solicitor recognized that the Court had two alternatives—removal of the governmental trustee and transfer of legal title to a private trustee, or removal of the restriction as to admission to Girard College.

removing the City of Philadelphia because of its incapacity to carry out the terms of Stephen Girard's will, the Court was exercising the historic power of a court of chancery. It was doing nothing novel or applying to the present situation any law different from what the courts of Pennsylvania had applied from the time of the founding of the province. As stated by the Supreme Court of Pennsylvania (J.S. 47-48):

> "Over and above such statutory power, it has long been established that the Orphans' Court possesses the power of a court of chancery in aid of an exercise of its jurisdiction: see *Stevens's Estate*, 200 Pa. 318, 322, 49 A. 985. What was said there in the opinion of the court below, whereon this court affirmed *per curiam*, is presently so pertinent as to justify the following quotation: 'The courts of Pennsylvania have looked with favor upon charities, and the law of the state, as administered from the beginning of this province, has always been broad enough to discern the objects of every charity and to preserve and enforce it, notwithstanding any defect, such as want of power in the trustees or otherwise: The Apprentices' Fund Case, 13 Pa. C. C. Rep. 241. Therefore, when a charity is established in any manner, such a slight impediment as a defect or want of power in the trustee to execute it does not stand in the way; the charity remains; the trustee is declared incapable of acting, and a competent trustee is appointed in his place. Chancery here steps in to enforce it and commits it to some one who may lawfully administer it: Frazier *v.* St. Luke's Church, 147 Pa. 256'."

This Court itself in dealing with Stephen Girard's Will recognized the same principle of law. In *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), wherein the heirs of Stephen Girard among other things unsuccessfully attacked the capacity of the City of Philadelphia to act

as trustee, this Court, speaking through Mr. Justice Story, said (p. 188):

> "But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

This view was reiterated in *Girard* v. *Philadelphia*, 7 Wall. 1, 12 (1868).

Appellees submit that no inference can be drawn that the courts of Pennsylvania in this case were applying new or unusual state law or in any way attempting to avoid constitutional limitations by "patterning" state law to this case. The action of the court clearly has such a fair and substantial basis that its decision thereon should be accepted by this Court.

Under the laws of Pennsylvania the trust for Girard College is a private trust and the institution is a private college and orphan establishment. That this view of the Pennsylvania Supreme Court was not taken to evade a constitutional issue but is founded on a fair and substantial basis will be hereinafter demonstrated.

B. Stephen Girard's Orphan Establishment is a Private Charitable Institution and Has Not Become a Public School.

The Pennsylvania Supreme Court found that Girard College is not a public institution, but, on the contrary, is a private charitable school and orphan establishment. On this point the Court said:

> "The testator's primary and dominant object was to found a private charitable institution for the training, education and maintenance of poor male white orphans." (J. S. 44).

"It is not possible to read Girard's will without being deeply impressed with the fact that it was *the College, as a private charity,* and *not the trusteeship of the City,* that was the primary object of the donor's testamentary scheme." (J. S. 44). (Emphasis by the Court.)

"The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate." (J. S. 45).

This decision of the Pennsylvania Court, rejecting the claims which are here advanced by appellants, was based on principles of state law—the construction of a Pennsylvania citizen's will, the administration of a trust established by his will, and the interpretation and significance of Pennsylvania statutes.

The construction of private trust instruments, and the characterization for constitutional law purposes of interests vested thereunder, are matters of state law, *Nickel* v. *Cole,* 256 U. S. 222, 225 (1921), as are questions of the propriety of probate proceedings, *Bilby* v. *Stewart,* 246 U. S. 255 (1918), and the duties of a trustee, *Rockhold* v. *Rockhold,* 92 U. S. 129 (1875). It is respectfully submitted that the finding as to the private nature of Girard College is fully supported by the previously established law of Pennsylvania and of this Court, and by the uncontroverted facts.

The appellants make broad and unsubstantiated claims that the trust for Girard College is a public trust or public institution and municipal property. They avoid advising the Court when and how, under recognized legal principles, it became such and in what sense it is "public."

The phrase "public institution" has a number of meanings; for example, the trust for Girard College is "public" in the sense that it is for a charitable purpose. However, "all charities are in some sense public. If a trust is for any particular persons, it is not a charity.

Indefiniteness is of its essence." *Philadelphia* v. *Fox*, 64 Pa. 169, 182 (1870). Again, the trust for Girard College is "public" in the sense that it provides education in relief of the taxpayers.

The determinative meaning of public institution in the setting of the Federal Constitution, however, is that the institution is an arm of the State or subject to sweeping control and direction by the State. Girard College is not and never has been a public institution within this meaning.

That a trust such as that created by Stephen Girard for Girard College has always been recognized by Pennsylvania law as a private charity is perhaps most clearly set forth in the case of *Brown* v. *Hummel*, 6 Pa. 86 (1847). That case involved an attempt by the Pennsylvania legislature to alter the terms of a will establishing a perpetual trust for the education of orphans in an orphan establishment. In holding that the legislature utterly lacked the power to change the directions of the testator, the Court said:

> "George Fry, by this will, constituted a private charity, which was regulated throughout by the minutest rules for its dispensation and government. It was *his* charity and benevolence, and not the charity and benevolence of the state, or anybody else." *Id.* at 92. (Emphasis by the Court.)
>
> "The estate was the property of George Fry, dedicated by him *not to the public*, but to a charity limited in its design and operation and sphere, to be conducted by the rules *he* prescribed, and not by general or special law." *Id.* at 92. (Emphasis by the Court.)
>
> "If the legislature, by *ex parte* enactment, can alter the will of a private individual, whose will shall escape? On whose will shall the hand of legislative innovation next be laid? It is the principle and not the individual instance that is to be considered. What private charity will next be disturbed and invaded?

The will of Stephen Girard offers a conspicuous mark." *Id.* at 94.

The decision in *Brown* v. *Hummel, supra,* is in accord with the holding of this Court in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518 (1819). The several opinions delivered therein established the principle that an educational institution, founded and maintained with private funds, is a private charity, and cannot be expropriated by the State and made into a public institution. *E. g., id.* at 633, 634, 636 (Marshall, C. J.); *id.* at 660, 665 (Washington, J.); *id.* at 671-72, 697-98 (Story, J.)

1. *The Uncontroverted Facts Establish the Private Status of Girard College.*

That Girard intended to create a private institution is clear from the terms of his Will. In Clause IV of the Will he made a gift specifically for the "public schools" (App. 52). However, when he created the trust for Girard College, he prefaced the bequest with the expression of his desire "to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds" (App. 61).

There can be no question that Girard had the right to establish a private charity and to limit the beneficiaries of that charity to a specific class; the world is too large and its people too many to permit per capita beneficence for all who might deserve it.

The private character of Girard College is further established by the following uncontroverted facts:

1. Girard College was erected on land bequeathed by Stephen Girard and in accordance with the meticulous directions set forth in Clause XXI of the Will and the Codicil thereto (App. 62, 82).

2. No State or City funds or property have ever been used for the support and maintenance of Girard College.

3. The staff and teachers of Girard College are selected in conformity with the provisions of Clause XXI, paragraph 2, of the Will (App. 68). The salaries of these employees are paid solely out of the trust estate. The teachers of Girard College are not subject to the control of the Board of Education of the City of Philadelphia, which has charge of the City public school system.

4. The basic curriculum of study in Girard College is specifically prescribed by Clause XXI, paragraph 7, of the Will (App. 70).

5. The selection of the students to be admitted to Girard College is made on the basis of their birthplace rather than their place of residence at the time of admission. The priority in the selection of students is, first, those born in the City of Philadelphia; secondly, those born in any other part of Pennsylvania; thirdly, those born in the City of New York; and lastly, those born in the City of New Orleans (Clause XXI, paragraph 6; App. 69).

6. The orphans are fed, clothed and housed on the College grounds at the expense of the trust estate.

7. All the Philadelphia real estate of the Girard College trust is taxed by the City, except for the College grounds and buildings, which property shares a statutory exemption in common with all other charities, including non-profit private schools (Cert. Tr. 476-477).

The above facts demonstrate beyond any question that the Girard College trust is, as it was intended to be, a

private charity established for the purpose of supporting and maintaining a private college and orphan establishment.

The appellants, however, not being able to challenge the above facts, make the broad claim that Girard College is a public institution. Their contentions will be answered seriatim.

2. *No Legislation Did or Could Make Girard College a Public Institution.*

The statutes and ordinances printed in Appendix B to the Jurisdictional Statement (J.S. 83 *et seq.*) were urged by appellants before the Pennsylvania Supreme Court as being required by Girard's Will and necessary to put the trust for the College in operation. That argument was rejected *in toto* by the Supreme Court of Pennsylvania, speaking through Mr. Chief Justice Jones, as follows (J.S. 45-46):

> "The statutes and ordinances which the appellants urge as having made a public trust of Girard College did not so operate. Certain it is that no additional legislation was required to clothe the City with the fiduciary powers necessary for the administration of Girard College. * * * [Quotation from *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), omitted.] The legislative enactments which the appellants stress were designed in large part to enable the Commonwealth and the City to receive and use for their governmental purposes pecuniary legacies bequeathed directly to them by Girard's will. The rest of the legislative enactments were purely administrative measures neither envisioned nor required by Girard's will. And, the same can be said for the ordinances which the appellants cite."

The terms of the Will and the Pennsylvania law support fully the above holding that:

(1) Stephen Girard's Will neither specified nor requested the enactment of any legislation with respect to Girard College; and

(2) no legislation was required or necessary in order to give effect to the Girard College trust.

There is no basis in Girard's Will for the proposition that he required, requested, intended or contemplated that the Pennsylvania legislature should enact statutes with regard to the establishment and operation of Girard College. Legislation is mentioned by Stephen Girard only in Clauses XXII and XXIII of the Will (App. 72-76). In Clause XXII he requests legislation to enable the City to carry out the improvements specified therein, viz., the paving of public streets, the tearing down of wooden houses, and the like, none of which had anything to do with the trust for Girard College. In Clause XXIII he conditions a separate bequest to the Commonwealth of $300,000 upon the enactment of such legislation. Nowhere else in his Will did Girard ask for, suggest or require legislation of any kind.

None of the statutes in question was necessary in order to carry out the provisions in Girard's Will for the establishment and operation of the College. In *Vidal* v. *Girard's Executors*, 2 How. 127, 191 (1844), after finding that the City had power under the law of Pennsylvania to take property upon trust for charitable purposes, this Court said with respect to the Act of March 24, 1832, P. L. 176, and the Act of April 4, 1832, P. L. 275:

> "No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the corporation to take and hold the property devised upon the trusts named in the will."

Thus, it is clear that the above cited Acts were entirely unnecessary to vest power in the City to act as trustee for the College.[6]

Appellants contend that, in order to effectuate Clause XXI, paragraphs 5 and 9, of the Will (App. 69, 70), it was necessary for the legislature to enact the Act of February 27, 1847, P. L. 178, 53 Purd. Pa. Stat. §§ 16339-16344, as supplemented and amended by the Acts of April 20, 1853, P. L. 624, § 6, 53 Purd. Pa. Stat. § 16345, and May 23, 1887, P. L. 168, 43 Purd. Pa. Stat. § 81. From this contention they draw the inference that Girard intended such legislation. These Acts covered the binding into the College and the binding out of "poor white male orphans," and declared the City to be the guardian of such orphans at the College. They were not called for by Clause XXI of the Will, nor were they necessary to accomplish Girard's purposes. Under the common law of Pennsylvania, guardians, parents, or the surviving parent or next of kin of a minor child could relinquish to a third party the custody and control of such minor by indenture, provided such action was for the beneficial interest of the minor. *Enders* v. *Enders,* 164 Pa. 266, 30 A. 129 (1894); *Book's Estate,* 297 Pa. 543, 147 A. 608 (1929); *Dougherty Adoption Case,* 358 Pa. 620, 58 A. 2d 77 (1948).

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[6] The Act of March 24, 1832, P. L. 176 (printed in full in Appendix B hereto, pages 85-93), is concerned with the improvements mentioned in Clause XXII of the Will. Those improvements—none of which has anything to do with Girard College—are treated in detail in the first nine sections of the Act, which sections appellants disingenuously omit from their excerpt of the statute (J. S. 86). In their Statement of the Case (J. S. 14), they go further in their disingenuousness and omit from their quotation of Section 10 the following operative words: "which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect the said Stephen Girard has desired the legislature to enact the necessary laws." Section 11 (mistakenly cited by appellants as Section 2) of this Act, dealing with the method by which streets might be opened, was neither requested nor required by Stephen Girard but was a purely voluntary act on the part of the Commonwealth.

The appellants argue that, since the Act of 1847, *supra* (J. S. 87), constitutes the City as guardian of the orphans in Girard College, state participation in the administration of the College continues even after the removal of the City as trustee.

Stephen Girard at no place in his Will mentions any guardianship by the City such as is set up under Section 3 of the above cited Act. Moreover, it is obvious from a reading of the Act itself that the City's guardianship was only to be concurrent with its trusteeship of the Girard College trust. For example, the first paragraph of the Act provides for the consent of a mother, guardian, etc., to bind a "poor white male orphan child" by indenture "to the mayor, aldermen and citizens of Philadelphia, *as trustees under the will of Stephen Girard.*" (Emphasis supplied.) The entire Act shows that the guardianship set up under Section 3 deals solely with poor white male orphans who are under indenture to the City as trustee.[7]

Once the City, acting through the Board of City Trusts, has been removed as trustee, its guardianship likewise ceases. Upon the filing of its accounts as guardian before the Orphans' Court, it can be removed and new guardians appointed. *Burns Estate,* 2 Pa. D. & C. 2d 579 (O. C. Phila. 1955). This jurisdiction over the guardianship of Girard College minors as found in *Burns Estate* is in no respect different from that exercised by the Orphans' Court with respect to the general fiduciary duties of the Board of City Trusts. In *Wilson* v. *Board of Directors of City Trusts,* 324 Pa. 545, 188 A. 588 (1936), it was contended that, in view of the Act of June 30, 1869, P. L. 1276, 53 Purd. Pa. Stat. §§ 16365-16370 (J.S. 83), the Orphans' Court did not possess plenary power over trusts

[7] With regard to the Act of 1847, appellants find themselves in the anomalous position of relying upon a statute which by its express terms applies only to "poor male white orphan" children. In view of the earlier decision of this Court in this case, that Act is of questionable constitutional validity.

administered by the Board, including that for Girard College. In answer to this, the Court said (324 Pa. at 554, 188 A. at 593):

> "While the board of judges of the common pleas court appoints the trustees, the orphans' court possesses exclusive control over them in the conduct of testamentary trusts. They are, as to the orphans' court, in the same situation as other trustees amenable to them."

Such power of the Orphans' Court was reaffirmed by the decision in the instant case (J. S. 48).

Appellants contend that various other state contacts with Girard College will continue to exist, notwithstanding the removal of the Board of City Trusts as trustee, because of various statutory duties imposed on certain City officials (J.S. 11, 16-17, 33). This contention ignores the fact that under all the legislative enactments cited by appellants, the duties thereby enjoined exist only with regard to trusts of which the City, through the Board of City Trusts, is acting as trustee. Act of June 30, 1869, P. L. 1276, 53 Purd. Pa. Stat. §§ 16365-16370; Philadelphia Home Rule Charter, Section 6-400 (c).

Nowhere under the Act of 1869 or the Charter is Girard College mentioned. These enactments by their terms apply generally to all trusts administered by the Board. For example, under the Act of 1869 the City Treasurer is designated Treasurer of the Board of Directors of City Trusts, not "Treasurer of Girard College," as is incorrectly stated by the appellants (J.S. 17).

The Act of 1869 created the Board of Directors of City Trusts and transferred to it, for the purposes of administration, all trusts vested in the City as Trustee. As found specifically in *Wilson* v. *Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588 (1936), and as reaffirmed by the opinion of the Pennsylvania Supreme Court in the instant case (J.S. 48), the Act of 1869 in no

way divested the Orphans' Court of jurisdiction over the Board of City Trusts as trustees for Girard College.

With the removal of the Girard College trust from the control of and administration by the Board of City Trusts,[8] the duties and visitorial powers prescribed by the Act of 1869 and the Charter ceased to have any application to the College.

It should be noted that Stephen Girard neither requested nor required any of the above legislation. He did direct in Clause XXIV of his Will (App. 78) that the City as trustee should render annually to the State Legislature a detailed account concerning the Estate and a report on the condition of the College, and should submit books and accounts to a legislative committee if the same were requested. But this does not make Girard College a public school, as is demonstrated by the fact that the Commonwealth exercises extensive control and visitation over private schools of all kinds.[9] If the mere requirement

[8] Appellants attempt further to cloud the issues in this case by raising a question as to the scope of the Orphans' Court decree (J. S. 11). The substituted trustees have been appointed to administer only the trust for Girard College and no other trust in the Estate of Stephen Girard. The decree is to be read in the light of the issues which were before the Court. *E.g., Vicksburg* v. *Henson*, 231 U. S. 259, 269 (1913). Those issues related only to the trust for Girard College.

[9] Private schools, including Girard College, are subject to provisions of Title 24 of *Purdon's Pennsylvania Statutes* which require compulsory attendance of certain minors at schools where instruction is given, in the English language, in subjects and activities prescribed by the State Council of Education, § 13-1327; require reports on enrollment, attendance, and withdrawals, § 13-1332; and prescribe subjects of instruction, §§ 7-771, 15-1511, 15-1515, 15-1518. In addition, with respect to various other types of private schools, the statutes provide for licensing, approval of courses, regulation of standards of instruction, qualifications of teachers, equipment, financial resources, etc.; and for visitation by various state boards of: private trade schools, §§ 1725.1-1725.11; colleges, §§ 2421–2425; academies, §§ 2511–2514; private academic schools §§ 2731–2743; private business schools, §§ 2751–2760; correspondence schools, §§ 2771–2783; and private driver education or training schools §§ 2831-2845.

of reports to the Legislature makes Girard College a public institution, there can be no such thing as a private school in the entire Commonwealth.

3. *The Limited Tax Exemption Enjoyed by Girard College Is Granted to All Private Charities.*

Appellants point to the real and personal property tax exemption enjoyed by Girard College. They argue therefrom that the College is subsidized by the public authorities to the extent of the exemption, and must therefore be considered a public institution or a public school.

Under Pennsylvania law, Girard College, in enjoying this exemption, differs in no respect from any other charity or private non-profit school. Private school buildings and grounds are exempt from real estate taxes if the school is established for a charitable purpose and is administered without profit. *Hill School Tax Exemption Case,* 370 Pa. 21, 87 A. 2d 259 (1952). Nor does it matter that the charity is limited to a definite group or class. *Burd Orphan Asylum* v. *School District of Upper Darby,* 90 Pa. 21 (1880).

With respect to personal property taxes, appellants' Exhibit No. 18 (Cert. Tr. 662) indicates the amount which the Girard College trust would be required to pay to the School District and to the City of Philadelphia if it were not exempt from such taxes. This exemption enjoyed by the College is granted in like measure to all trust estates for non-profit religious, charitable or educational organizations. Act of June 17, 1913, P. L. 507, § 1, as amended, 72 Purd. Pa. Stat. § 4821; Act of May 23, 1949, P. L. 1676, § 2, as reenacted and amended, 24 Purd. Pa. Stat. § 581.32.

It appears from the typewritten transcript (Cert. Tr. 474 *et seq.*) that the Girard College trust, a private charity, is assessed by and pays substantial real estate taxes to the City of Philadelphia on all of its real estate outside the College grounds. The same transcript reveals

(and it is an obvious fact) that the City does not levy any tax on real estate which it owns (Cert. Tr. 476). Yet appellants claim that Girard College is a public institution and is owned by the City of Philadelphia. The anomaly of their position is apparent.

4. *The City's Trusteeship Did Not and Could Not Transform Girard College into Public or Municipal Property.*

Appellants appear to advance the startling proposition that a gift to a municipality in trust for charitable purposes vests in the municipality, under Pennsylvania property law, complete ownership of the trust estate, both legal and beneficial, and that the trust *res* thereby becomes public or municipal property. The cases cited by the appellants stand for no such proposition.

The primary beneficiaries of the trust estate are poor male white orphans, with priority for those born, first, in the City of Philadelphia, then the Commonwealth of Pennsylvania, the City of New York and, finally, the City of New Orleans. If the appellants are correct in their theory that the public, rather than those designated beneficiaries, are the beneficial owners of the trust *res* for Girard College, then every decision on Girard's Will by this Court and the courts of Pennsylvania since *Vidal* v. *Girard's Executors*, 2 How. 127 (1844), is meaningless.

The appellants' argument runs counter to the established rule of law that a municipality "assumes the same burden and is subject to the same regulations that appertain to other trustees of such trusts. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity." 10 McQUILLIN, MUNICIPAL CORPORATIONS (3d ed. 1950), § 28.25. See also *Wilson* v. *Board of Directors of City Trusts*, 324 Pa. 545, 188 A. 588 (1936). It is equally well established that, if a municipality is incapable of acting as

trustee of a charitable trust, the municipality will be removed as trustee and new trustees appointed. *Vidal* v. *Girard's Executors, supra; Girard* v. *Philadelphia*, 7 Wall. 1 (1868); 10 McQUILLIN, *op. cit.*, § 28.36.

A further argument of appellants with respect to the trust estate being public or municipal property is based upon the theory that, since the estate has grown during the City's trusteeship of 127 years from $2,000,000 to $100,000,000, it has become "infused" with "a governmental and public character which now cannot be eradicated by decree" (J.S. 32). It is submitted that no fiduciary can, by the passage of time, obtain an interest adverse to a trust estate in its hands, nor can it change the legal character of the trust by judicious management.

In support of their conclusion that Girard College is public property, the appellants cite the case of *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (4 Cir.), *cert. den.*, 326 U. S. 721 (1945). However, the difference between the operative facts in that case and the present case merely emphasizes the weakness of appellants' position. Enoch Pratt intended, as Stephen Girard did not, to establish a public institution. Pratt's gift was for the benefit of "our whole City," "rich and poor, without distinction of race or color * * *" 54 F. Supp. 514 at 520, 525 n. 2 (D. Md. 1944). The Court of Appeals found that his purpose was "to create an institution which would belong to the City of Baltimore and serve all of its people" 149 F. 2d at 215. Equally important, and directly contrary to the facts in this case, Pratt gave the Library to Baltimore on the express condition that the City would create a perpetual annuity for maintenance. By the time of the suit, the City's contributions exceeded $800,000 per annum. *Id.* at 216. It was not the funds of Pratt but rather state money which continued "to supply it with the means of existence." *Id.* at 219.

When all is said and done, the City's contribution to Girard College reduces itself to free management services by the Mayor and President of City Council who, together with twelve other public-spirited citizens, comprise the Board of Directors of City Trusts. Stephen Girard did not direct that City officials serve without compensation. All costs of administration have been and are borne by the Estate of Stephen Girard. The citizen members of the Board of Directors of City Trusts serve without compensation. There is no showing that the City officials received any additional compensation from the City for performing their functions with regard to Girard College or that the services performed were such as to interfere with the performance of their official duties. Moreover, the service of public officials as ex officio trustees is by no means an unusual practice with regard to private eleemosynary institutions. See, *e. g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 648-9 (1819).

To contend, as do appellants, that Girard College not only was but still is a public institution "because the 'new' trustees include the majority of the appointed members of the Board [of City Trusts]" (J.S. 11), is frivolous. This argument assumes that public-spirited citizens who, voluntarily and without compensation, serve the City in the administration of a charitable trust thereafter remain government agents for all purposes and for all times and that any subsequent action of theirs is "State action." Such a contention could scarcely be made even with regard to a compensated full-time employee of the City after he leaves the City's service. In designating the new trustees of Girard College, it was obviously proper for the Orphans' Court to select some individuals who had experience with the affairs of Girard College.

In summary, Stephen Girard intended to establish his College for orphans as a private charitable institution. This he had a right to do. The Commonwealth could not derogate from Girard's right or the rights of his beneficiaries

by legislation, nor do the statutes which Pennsylvania enacted with regard to Girard College, being purely administrative measures, detract from those rights. The character and operation of the College, from its founding down to date, have borne all the earmarks of a private institution. There is no factor which differentiates Girard College from other private charities and schools[10] in Pennsylvania aside from the trusteeship of the City. This single factor, as has been shown above, does not make Girard College a public institution or subject it to the unlimited control of the state.

C. The Enforcement of the Primary Purpose of Stephen Girard's Will by the Removal of the City of Philadelphia as Trustee of the Girard College Trust Does Not Violate the Fourteenth Amendment.

The prior appeal to this Court and the instant appeal present two separate and distinct Fourteenth Amendment questions which appellants persist in confusing. The prior appeal involved the individual appellants' constitutional immunity from discrimination by the State. The present appeal seeks to establish an alleged right of the individual appellants to share in the bounty of Stephen Girard on an equal basis with the beneficiary class designated by him. No citizen of the United States has such a right. It is submitted the Pennsylvania Supreme Court properly determined that the action of the Orphans' Court in removing the City as trustee of the Girard College trust denied no individual rights protected by the Fourteenth Amendment but merely eliminated that element in the operation of Girard College which this Court found to be unconstitutional.

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[10] In Pennsylvania in 1950, there were 927 elementary and 248 secondary non-public schools. STATISTICAL ABSTRACT OF THE UNITED STATES (1953 ed.), p. 119. Some of these were chartered under special acts of the Legislature. *E. g.*, Episcopal Academy, Act of March 29, 1787, 12 Pa. Stat. at Large 479.

Appellants' entire argument that the removal of the City as trustee violates the Fourteenth Amendment and the mandate of this Court on the prior appeal rests upon two alternative and overlapping fallacious assumptions: (1) that this Court held that the individual appellants have a "constitutional right to attend Girard College"; and (2) that Girard College was and remains a public institution. The first assumption will be analyzed below. The second has been treated above at pages 24-39, where it is made clear that, in spite of the City's trusteeship, Girard College always has been a private institution. Once the fog created by appellants' fallacious assumptions is lifted, the basic issues involved in the instant appeal stand out clearly. Those issues are the freedom of testamentary disposition, the independence of private charities, and whether or not the Fourteenth Amendment in fact guarantees the rights claimed by appellants.

1. *The Effect of This Court's Prior Decision.*

On the prior appeal, this Court held only that the Board of City Trusts as an agency of the State of Pennsylvania could not constitutionally administer a charity the beneficiaries of which are limited to individuals of a particular race. The Will's limitation that those admitted to the College be "poor white male orphans" was quoted. Nonetheless, this Court did not hold, nor did it suggest, that that limitation was invalid or that applicants not coming within the named beneficiary class were entitled to admission. To the contrary, this Court stated quite clearly:

> "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment." 353 U. S. at 231.

That language, it is respectfully submitted, does not constitute an adjudication that the individual appellants, who are not within the named beneficiary class, have a "constitutional right to attend" an institution founded and financed entirely with private funds pursuant to the explicit terms of an individual's will.

There is no indication in the opinion that this Court intended to limit in any way the right of a testator to select his beneficiaries and the right of those beneficiaries alone to enjoy his bounty. This Court has always been careful to point out that the Fourteenth Amendment does not apply to the action of private persons.

> "Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). See also *Barrows* v. *Jackson*, 346 U. S. 249, 253 (1953).

The prior appeal presented a distinctly different conflict from that which is now before this Court. The present appeal involves the adverse claims of private individuals —the individual appellants and the designated beneficiaries represented by the substituted trustees—to the Girard College trust. By contrast the prior appeal set in opposition the rights of citizens and the power of the State. By the very act of establishing a public school system, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or a golf course, *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955), a State creates in its citizens the right to enjoy those facilities on equal terms. In the *Brown* case, this Court said, "Such an opportunity, ***where the state has undertaken to provide it***, is a right which must be made available to all on equal terms." 347 U. S. at 493 (emphasis supplied).

This Court articulated the underlying rationale in *Strauder* v. *West Virginia*, 100 U. S. 303, 307-308 (1879):

> "* * * The words of the [Fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

It was the imposition by the State of just such a badge of inferiority which this Court found to violate the Fourteenth Amendment in the *Brown* case, 347 U. S. at 494. The similarly disparate treatment of its citizens by an agency of the State, even as a trustee, was the unconstitutional element in the operation of Girard College. That discrimination by the State ceased with the removal of the City as trustee.

The removal of the City as trustee was necessary, not only to eliminate the state discrimination found on the prior appeal, but also to protect the rights of admission of eligible "poor white male orphans," whom Stephen Girard selected as the beneficiaries of the Girard College trust. In light of the decision of this Court on the prior appeal, the City as trustee could no longer uphold the integrity of the Will and protect the interests of the named beneficiary class. Since there are more eligible poor white male orphans than can be admitted to Girard College,[11] for every Negro orphan admitted one member of the

[11] The Pennsylvania courts have specifically found that, "There is no shortage of poor white male orphans between the ages of six and ten; on the contrary there are more qualified applicants than can be accommodated." *Girard Will Case*, 386 Pa. 548, 570, 127 A. 2d 287, 297 (1956).

beneficiary class selected by Stephen Girard will be denied admission.

To continue the City as trustee, with the requirement that it not refuse admission to Negroes, would deprive members of the named beneficiary class of their established rights, solely by reason of their race, in violation of the Fourteenth Amendment. In such circumstances, to paraphrase *Barrows* v. *Jackson*, 346 U. S. 249 (1953), and *Shelley* v. *Kraemer*, 334 U. S. 1 (1948): "Solely because of their race," poor white male orphans "will be unable to • • • enjoy" their inheritance "on the same terms as" legatees of other testamentary benefactions. "Denial of this right by state action [*i. e.*, the continuance of the City as trustee] deprives such" poor white male orphans, "unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment." 346 U. S. at 254. "The difference between judicial enforcement and non-enforcement of" the City's trusteeship "is the difference to" poor white male orphans "between being denied rights of property [*i. e.*, the right of named beneficiaries alone to take their bequests] available to other members of the community and being accorded full enjoyment of those rights on an equal footing." 334 U. S. at 19.

Thus in removing the City as trustee the Orphans' Court was constitutionally fulfilling its primary purpose for existence, namely, to protect the estates of decedents and the rights of their beneficiaries to due process and the equal protection of the laws.

2. *The Principle of* Shelley *v.* Kraemer *Does Not Support Appellants' Position.*

(a) Individual Appellants as Citizens Have No Rights in the Estate of Stephen Girard.

Notwithstanding the fact that, as shown above, *Shelley* v. *Kraemer* and *Barrows* v. *Jackson, supra,* support the action of the Orphans' Court, appellants attempt to

invoke those decisions as a basis for their contention that the removal of the City as trustee violated the Fourteenth Amendment. Those cases held that the Fourteenth Amendment renders racially restrictive covenants on real estate unenforceable either in equity or at law. In both opinions, however, this Court stated that the Fourteenth Amendment does not make such covenants *per se* invalid or prevent voluntary adherence thereto. 334 U. S. at 13; 346 U. S. at 253. At the same time, this Court also pointed out that there was involved the constitutionally protected "right to acquire, enjoy, and dispose of property" to which Negroes are entitled "on an equal footing" with all other members of the community. 334 U. S. at 10, 19; 346 U. S. at 254.

Shelley held that court enforcement of such covenants by injunction violated the Fourteenth Amendment because the State thereby made available to private persons "the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willingly and financially able to acquire *and which the grantors are willing to sell.*" 334 U. S. at 19 (emphasis supplied). *Barrows* held that court enforcement of such covenants by awarding damages for breach violated the Fourteenth Amendment because the necessary result was that "*a prospective seller* of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." 346 U. S. at 254 (emphasis supplied).

The state judicial action in those cases violated the Fourteenth Amendment only because it operated to prevent, as in *Shelley,* or effectively to deter, as in *Barrows,* a property owner from selling to a Negro, thereby impinging upon the latter's constitutionally protected property

rights. Those cases explicitly preclude a finding of unconstitutionality in the mere refusal of a property owner to sell, even if his refusal is based upon voluntary adherence to a racially restrictive covenant. Such a finding would deprive property owners of their rights to sell when and to whom they choose and would create in members of particular groups a new and exclusive preemptive right.

Although the individual appellants have the same constitutional right as their fellow citizens to inherit property by will and intestate succession, neither the Fourteenth Amendment nor any other provision of the Federal Constitution gives them or any other citizen the right, *qua* citizen, to inherit any particular property or from any particular estate. They must first be specifically named or come within a class specified by the testator, or be entitled to take against the will or, if there is no will, by intestacy. The administration of a testator's estate by state courts pursuant to a valid will creates no rights in any member of the general public. As this Court said many years ago, "The fourteenth amendment * * * *does not* * * * *add anything to the rights which one citizen has under the Constitution against another.*" *United States* v. *Cruikshank*, 92 U. S. 542, 554 (1875).[12] (Emphasis supplied.)

(b) The Removal of the City as Trustee Conferred on Individual Appellants No Rights in the Estate of Stephen Girard.

In the last analysis, appellants' contention that the removal of the City as trustee violates the Fourteenth Amendment must rest on one of two interrelated propositions, both of which are untenable. The first of these is that members of particular groups can create new rights

[12] The *Cruikshank* case has been frequently quoted and followed on this point: *e. g.*, *United States* v. *Harris*, 106 U. S. 629, 638 (1882); *James* v. *Bowman*, 190 U. S. 127, 136 (1903); *Collins* v. *Hardyman*, 341 U. S. 651, 658 (1951).

for themselves simply by alleging such rights in a State court and having them denied. The second is that the individual appellants have a vested right to have the City participate in the operation of Girard College, even though the City cannot constitutionally carry out the terms of the Will. These two propositions will be considered in that order.

Appellants' argument based on *Shelley, Barrows,* and *Railway Employes' Dept. A.F.L.* v. *Hanson,* 351 U. S. 225 (1956), is nothing more than a claim that because the individual appellants have been denied admission to Girard College by the state courts, the Fourteenth Amendment entitles them to admission.

The individual appellants are claiming that their minority group status transforms a state court adjudication that they have no rights in certain private property into an adjudication whereby the STATE discriminatorily deprives them of property rights. If this be so, a state court cannot uphold a testamentary trust for the benefit of Negroes without depriving members of the white, yellow, and red races of equal protection of the laws. Clearly, a claimant who has no rights as a beneficiary or as a member of a beneficiary class has no standing to challenge on constitutional grounds the probate of a valid will, the appointment of an administrator or trustee, the denial of a claim, or the removal of a fiduciary who wrongfully recognizes a claim or cannot carry out the provisions of the will.[13]

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[13] Appellants seek to clinch their contention with the supposititious argument that if the Board of City Trusts first admitted the individual appellants and the Orphans' Court then removed the City as trustee and expelled them, there would be a clear violation of the Fourteenth Amendment. This assumes, contrary to the facts of this case, that a trustee will commit a breach of trust. It further assumes that a breach of trust can create in those who participate therein, and who are not beneficiaries, rights which a state court must protect.

From the decisions involving "Jaybird" primaries[14] and evasive leases of public property,[15] appellants seek to conclude that the City cannot constitutionally be removed as trustee and therefore individual appellants are entitled to admission to Girard College. The thrust of their argument seems to be that there is some constitutional requirement that the City remain as trustee of this private institution and that the Pennsylvania courts have forced the City to abdicate or evade this requirement. The teaching of the "Jaybird" primary cases is that the State cannot abdicate a necessary State function by permitting or endeavoring to make it wholly private. The right to participate in the electoral process on equal terms is obviously so much a part of the birthright of free men that it cannot be taken away from any group even by the failure of the State to act.

The second line of cases holds ineffective colorable leases of publicly-owned recreational facilities designed either to exclude Negroes entirely from, or to continue segregated use of, public facilities. In those cases the State was, and for all practical purposes remained, the owner and operator of the facilities and was required, therefore, to make them available on equal terms to all its citizens. Such decisions would be relevant only if Philadelphia were attempting, for discriminatory purposes, to abolish, or to lease to private persons, its established public school system. In this day and age, public schools may well have become so much a part of

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[14] *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Rice* v. *Elmore*, 165 F. 2d 387 (4 Cir. 1947), *cert. den.*, 333 U. S. 875 (1948).

[15] *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955); *Mayor of Baltimore* v. *Dawson*, 350 U. S. 877 (1955); *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971 (1954), *vacating* 202 F. 2d 275 (6 Cir. 1953); *City of Greensboro* v. *Simkins*, 246 F. 2d 425 (4 Cir. 1957); *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53 (E. D. Va. 1955), *aff'd per curiam*, 231 F. 2d 615 (4 Cir. 1956); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S. D. W. Va. 1948).

the American scene that children are entitled to have the State make available to them an unsegregated educational system. See *Brown* v. *Board of Education, supra,* 347 U. S. at 493.

The removal of the City as trustee of the Girard College trust can have no effect whatever on the Philadelphia public school system. Since *Trustees of Dartmouth College* v. *Woodward.* 4 Wheat. 518 (1819), it has been recognized that private schools such as Girard College not only exist, but are in fact entitled to exist, apart from the public school system. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). When the Orphans' Court removed the City as trustee of the Girard College trust, both Girard College and the City's public school system were left standing, as they have always stood, as independent entities with clearly independent sources of funds for their respective operations. No citizen of Philadelphia was thereby deprived of any public property, because not one cent of the taxpayers' money has gone into Girard College. The College was established solely with Stephen Girard's money pursuant to, and is administered in accordance with, the meticulous directions of Section XXI of his Will. It has been maintained solely by the income from his Estate pursuant to Sections XXI and XXIV of the Will. No Philadelphia child is denied a public school education or is compelled to attend a segregated school.

CONCLUSION.

Appellants charge that the action of the Pennsylvania courts provides a blueprint for the evasion of the decrees of this Court, with obvious reference to legislation passed by certain states following the decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954). The distinction between such legislation and the present case is too evident to warrant discussion.

The courts of Pennsylvania have not evaded. They have acted in accordance with the purpose for which they were formed and in accordance with the established law of Pennsylvania, as well as the law of charitable trusts laid down in opinions of this Court beginning in 1844.

It is agreed that this Court has always been solicitous of individual rights. So also have the Orphans' Court of Philadelphia County and the Supreme Court of Pennsylvania been solicitous of individual rights in taking the action of which the appellants here complain. Those courts have protected the right of an individual to dispose of his property by will as he sees fit. They have protected the rights of the members of the beneficiary class named by the testator to receive undiminished the benefits which he intended for them. It so happens that, in this case, the beneficiaries are "poor white male orphans." But in protecting them, the Pennsylvania Courts, applying the long-established law of the Commonwealth, have at the same time protected the rights of all beneficiaries of every private charity created by will, no matter what the race, creed or color of such beneficiaries may be.

That is the blueprint which the Pennsylvania Courts have followed and have in this case provided, a blueprint for the protection of individual rights.

Wherefore, it is respectfully requested that this Court grant the motion to dismiss the appeal and deny the petition for writ of certiorari.

Respectfully submitted,

ARTHUR LITTLETON,
Attorney for Substituted
Trustees, Appellees.

MORGAN, LEWIS & BOCKIUS,
Of Counsel.

APPENDIX A.

WILL OF STEPHEN GIRARD

Dated February 16, 1830. Codicils dated December 25, 1830, June 20, 1831.

Proved December 31, 1831.

Recorded Philada. Will Book 10, p. 198.

I, Stephen Girard, of the City of Philadelphia, in the Commonwealth of Pennsylvania, mariner and merchant, being of sound mind, memory, and understanding, do make and publish this my last will and testament, in manner following, that is to say . . .

I. I give and bequeath unto "The Contributors to the Pennsylvania Hospital," of which corporation I am a member, the sum of thirty thousand dollars, upon the following conditions, namely, that the said sum shall be added to their capital, and shall remain a part thereof forever, to be placed at interest and the interest thereof to be applied, in the first place to pay to my black woman Hannah (to whom I hereby give her freedom) the sum of two hundred dollars per year, in quarterly payments of fifty dollars each in advance, during all the term of her life; and, in the second place, the said interest to be applied to the use and accommodation of the sick in the said hospital, and for providing and at all times having competent matrons, and a sufficient number of nurses and assistant nurses, in order not only to promote the purposes of the said hospital, but to encrease this class of useful persons much wanted in our city:

II. I give and bequeath to "The Pennsylvania Institution for the Deaf and Dumb" the sum of twenty thousand dollars, for the use of that institution:

III. I give and bequeath to "The Orphan Asylum of Philadelphia," the sum of ten thousand dollars for the use of that Institution:

IV. I give and bequeath to "the Comptrollers of the public schools for the city and county of Philadelphia" the sum of ten thousand dollars for use of the schools upon the Lancaster system, in the first section of the first school district of Pennsylvania.

V. I give and bequeath to "The Mayor, Aldermen and Citizens of Philadelphia," the sum of ten thousand dollars, in trust safely to invest the same in some productive fund, and with the interest and dividends arising therefrom to purchase fuel between the months of March and August in every year forever, and in the month of January in every year forever distribute the same, amongst poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia.

VI. I give and bequeath to the society for the relief of poor and distressed masters of ships, their widows and children, (of which society I am a member) the sum of ten thousand dollars to be added to their capital stock, for the uses and purposes of said society.

VII. I give and bequeath to the gentlemen, who shall be trustees of the Masonic Loan at the time of my decease, the sum of twenty thousand dollars, including therein ten thousand and nine hundred dollars due to me, part of the Masonic Loan, and any interest that may be due thereon at the time of my decease, in trust for the use and benefit of "the Grand Lodge of Pennsylvania and masonic jurisdiction thereto belonging," and to be paid over by the said trustees to the said Grand Lodge for the purposes of being invested in some safe stock or funds,

or other good security, and the dividends and interest arising therefrom to be again so invested and added to the capital, without applying any part thereof to any other purpose until the whole capital shall amount to thirty thousand dollars, when the same shall forever after remain a permanent fund or capital, of the said amount of thirty thousand dollars, the interest whereof shall be applied from time to time to the relief of poor and respectable brethren: and in order that the real and benevolent purposes of masonic institutions may be attained, I recommend to the several lodges not to admit to membership, or to receive members from other lodges, unless the applicants shall absolutely be men of sound and good morals.

VIII. I give and bequeath unto Philip Peltz, John Lentz, Francis Hesley, Jacob Baker and Adam Young, of Passyunk township, in the county of Philadelphia, the sum of six thousand dollars, in trust that they or the survivors or survivor of them shall purchase a suitable piece of ground, as near as may be in the centre of said township, and thereon erect a substantial brick building, sufficiently large for a school house and the residence of a schoolmaster, one part thereof for poor male white children, and the other part for poor female white children of said township; and as soon as the said school-house shall have been built, that they the said trustees or the survivors or survivor of them shall convey the said piece of ground and house thereon erected, and shall pay over such balance of said sum as may remain unexpended, to any board of directors and their successors in trust, which may at the time exist or be by law constituted, consisting of at least twelve discreet inhabitants of the said township, and to be annually chosen by the inhabitants thereof; the said piece of ground and house to be carefully maintained by said directors and their successors solely for the purposes of a school as aforesaid

forever, and the said balance to be securely invested as a permanent fund, the interest thereof to be applied from time to time towards the education in the said school of any number of such poor white children of said township; and I do hereby recommend to the citizens of the said township to make additions to the fund whereof I have laid the foundation.

IX. I give and devise my house and lot of ground thereto belonging, situate in rue Ramouet aux Chartrons, near the city of Bordeaux, in France, and the rents issues and profits thereof to my brother Etienne Girard and my niece Victoire Fenellon (daughter of my late sister Sophia Girard Capayron) (both residing in France) in equal moieties for the life of my said brother, and, on his decease, one moiety of the said house and lot to my said niece Victoire and her heirs forever, and the other moiety to the six children of my said brother, namely John Fabricius, Marguerite, Anne Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike (the issue of any deceased child if more than one to take amongst them the parent's share) and their heirs forever.

X. I give and bequeath to my said brother Etienne Girard the sum of five thousand dollars, and the like sum of five thousand dollars to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same, to any issue of such deceased child, if more than one share and share alike.

XI. I give and bequeath to my said niece Victoire Fenellon the sum of five thousand dollars.

XII. I give and bequeath absolutely to my niece Antoinetta, now married to Mr. Hemphill, the sum of ten thousand dollars, and I also give and bequeath to her the

sum of fifty thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said sum of fifty thousand dollars upon good security, and pay the interest and dividends thereof as they shall from time to time accrue, to my said niece for her separate use, during the term of her life, and from and immediately after her decease, to pay and distribute the capital to and among such of her children and the issue of deceased children, and in such parts and shares as she the said Antoinetta, by any instrument under her hand and seal executed in the presence of at least two credible witnesses shall direct and appoint, and for default of such appointment then to and among the said children and issue of deceased children in equal shares, such issue of deceased children if more than one to take only the share which their deceased parent would have taken if living.

XIII. I give and bequeath unto my niece Carolina, now married to Mr. Haslam, the sum of ten thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said money upon good security, and pay the interest and dividends thereof from time to time, as they shall accrue, to my said niece, for her separate use, during the term of her life; and, from and immediately after her decease, to pay and distribute the capital to and among such of her children and issue of deceased children, and in such parts and shares, as she the said Carolina, by any instrument under her hand and seal executed, in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the said children and issue of deceased children, in equal shares, such issue of deceased children if more than one, to take only the share which the deceased parent would have taken if living: but if my said niece Carolina shall leave no issue,

the said trustee or trustees on her decease shall pay the said capital and any interest accrued thereon to and among Caroline Lallemand (niece of the said Caroline) and the children of the aforesaid Antoinetta Hemphill, share and share alike.

XIV. I give and bequeath to my niece Henrietta, now married to Dr. Clark, the sum of ten thousand dollars; and I give and bequeath to her daughter Caroline (in the last clause above named) the sum of twenty thousand dollars—the interest of the said sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied to the maintenance and education of the said Caroline during her minority, and the principal with any accumulated interest to be paid to the said Caroline, on her arrival at the age of twenty-one years.

XV. Unto each of the captains, who shall be in my employment at the time of my decease, either in port or at sea, having charge of one of my ships or vessels, and having performed at least two voyages in my service, I give and bequeath the sum of fifteen hundred dollars—provided he shall have brought safely into the port of Philadelphia, or if at sea at the time of my decease shall bring safely into that port, my ship or vessel last entrusted to him, and also that his conduct during the last voyage shall have been in every respect conformable to my instructions to him.

XVI. All persons, who at the time of my decease, shall be bound to me by indenture, as apprentices or servants, and who shall then be under age, I direct my executors to assign to suitable masters immediately after my decease, for the remainder of their respective terms, on conditions as favorable as they can in regard to education, clothing, and freedom dues; to each of the said persons, in my service and under age at the time of my decease I give and bequeath the sum of five hundred dollars, which sums

respectively I direct my executors safely to invest in public stock, to apply the interest and dividends thereof towards the education of the several apprentices or servants, for whom the capital is given, respectively, and at the termination of the apprenticeship or service of each to pay to him or her the said sum of five hundred dollars and any interest accrued thereon, if any such interest shall remain unexpended: in assigning any indenture, preference shall be given to the mother, father, or next relation, as assignee, should such mother, father, or relative desire it, and be at the same time respectable and competent.

XVII. I give and bequeath to Francis Hesley (son of Mrs. S. Hesley, who is mother of Marianne Hesley) the sum of one thousand dollars, over and above such sum as may be due to him at my decease.

XVIII. I charge my real estate in the state of Pennsylvania with the payment of the several annuities or sums following. (the said annuities to be paid by the treasurer or other proper officer of the city of Philadelphia appointed by the corporation thereof for the purpose out of the rents and profits of said real estate, hereinafter directed to be kept constantly rented) namely:

1. I give and bequeath to Mrs. Elizabeth Ingersoll, widow of Jared Ingersoll, esq., late of the city of Philadelphia, counsellor at law, an annuity or yearly sum of one thousand dollars, to be paid in half yearly payments, in advance, of five hundred dollars each during her life:—

2. I give and bequeath to Mrs. Catherine Girard, now widow of Mr. J. B. Hoskins, who died in the isle of France, an annuity or yearly sum of four hundred dollars, to be paid in half yearly payments in advance of two hundred dollars each, during her life.

3. I give and bequeath to Mrs. Jane Taylor, my present housekeeper (the widow of the late captain Alex-

ander Taylor, who was master of my ship Helvetius and died in my employment) an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each, during her life.

4. I give and bequeath Mrs. S. Hesley, my house-keeper at my place in Passyunk Township, an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each during her life.

5. I give and bequeath to Marianne Hesley, daughter of Mrs. S. Hesley, an annuity or yearly sum of three hundred dollars, to be paid to her mother for her use in half yearly payments in advance of one hundred and fifty dollars each, until the said Marianne shall have attained the age of twenty-one years, when the said annuity shall cease, and the said Marianne will receive the five hundred dollars given to her and other indented persons, according to clause XVI. of this will:

6. I give and bequeath to my late house-keeper, Mary Kenton, an annuity or yearly sum of three hundred dollars to be paid in half year payments in advance of one hundred and fifty dollars each during her life.

7. I give and bequeath to Mrs. Deborah Scott, sister of Mary Kenton, and wife of Mr. Edwin T. Scott, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

8. I give and bequeath to Mrs. Catherine McLaren, sister of Mary Kenton, and wife of Mr. M. McLaren, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

9. I give and bequeath to Mrs. Amelia G. Taylor, wife of Mr. Richd M. Taylor, an annuity or yearly sum of three

hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

XIX. All that part of my real and personal estate, near Washita, in the state of Louisiana, the said real estate consisting of upwards of two hundred and eight thousand arpens or acres of land, and including therein the settlement hereinafter mentioned, I give, devise, and bequeath, as follows, namely: 1. I give devise and bequeath to the corporation of the City of New Orleans, their successors and assigns, all that part of my real estate, constituting the settlement formed on my behalf by my particular friend Judge Henry Bree, of Washita, consisting of upwards of one thousand arpens or acres land with the appurtenances and improvements thereon, and also all the personal estate thereto belonging and thereon remaining, including upwards of thirty slaves now on said settlement and their encrease, in trust, however, and subject to the following reservations: I desire, that no part of the said estate or property, or the slaves thereon, or their encrease, shall be disposed of or sold for the term of twenty years from and after my decease, should the said judge Henry Bree survive me and live so long, but that the said settlement shall be kept up by the said judge Henry Bree, for and during said term of twenty years, as if it was his own, that is, it shall remain under his sole care and control, he shall improve the same by raising such produce as he may deem most advisable, and, after paying taxes and all expenses in keeping up the settlement by clothing the slaves and otherwise, he shall have and enjoy for his own use all the nett profits of said settlement —provided however and I desire that the said judge Henry Bree shall render annually to the corporation of the City of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and encrease of the slaves, and the nett result of the whole. I desire that, at the expiration of the said term of twenty

years, or on the decease of the said Judge Henry Bree, should he not live so long, the land and improvement forming said settlement, the slaves thereon or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said Corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said corporation to such uses and purposes as they sh ll consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans: But, until the said sale shall be made, the said corporation shall pay all taxes, prevent waste or intrusion, and so manage the said settlement and the slaves and their encrease thereon, as to derive an income, and the said income shall be applied from time to time, to the same uses and purposes for the health and general prosperity of the said inhabitants. 2. I give devise and bequeath to the Mayor Aldermen and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Washita in the said state of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste or intrusion, for the term of ten years from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually from time to time, and apply the proceeds of such sales to the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate. 3. And I give devise and bequeath to the Corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the Mayor Aldermen and citizens of Philadelphia, to pay the taxes on the said lands and preserve them from waste and intrusion for the term of ten years from and after my decease, and, at the end of the said term when they shall

deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the proceeds of such sales to such uses and purposes as the said corporation may consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans.

XX. And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto "The Mayor, Aldermen and citizens of Philadelphia" their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said The Mayor Aldermen and citizens of Philadelphia or their successors, but the same shall forever thereafter be let from time to time to good tenants, at yearly or other rents and upon leases in possession not exceeding five years from the commencement

thereof, and that the rents issues and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and Liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same whenever necessary by erecting new buildings, and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate; And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burmley, in trust to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary—in erecting as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets, in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all other things needful to carry into effect my general design. The said College shall be constructed with the most durable materials and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength.

convenience and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles: It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice: It shall be fire-proof inside and outside, the floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows and shutters: Cellars shall be made under the whole building, solely for the purposes of the institution; the doors to them from the outside shall be on the east and west of the building, and access to them from the inside shall be had by steps, descending to the cellar floor from each of the entries or halls hereinafter mentioned, and the inside cellar doors to open under the stairs on the north-east and north-west corners of the northern entry, and under the stairs on the south-east and south-west corners of the southern entry; there should be a cellar window under and in a line with, each window in the first story—they should be built one half below, the other half above, the surface of the ground, and the ground outside each window should be supported by stout walls; the sashes should open inside, on hinges, like doors, and there should be strong iron bars outside each window; the windows inside and outside should not be less than four feet wide in the clear: There shall be in each story, four rooms, each room not less than fifty feet square in the clear; the four rooms on each floor to occupy the whole space east and west on such floor or story, and the middle of the building north and south; so that in the north of the building, and in the south thereof, there may remain a space, of equal dimensions, for an entry or hall in each, for stairs and landings: In the north-east and in the north-west corners of the northern entry or

hall on the first floor, stairs shall be made so as to form a double staircase, which shall be carried up through the several stories; and, in like manner, in the south-east and south-west corners of the southern entry or hall, stairs shall be made, on the first floor, so as to form a double stair-case, to be carried up through the several stories; the steps of the stairs to be made of smooth white marble with plain square edges, each step not to exceed nine inches in the rise, nor to be less than ten inches in the tread: the outside and inside foundation walls shall be at least ten feet high in the clear from the ground to the ceiling: the first floor shall be at least three feet above the level of the ground around the building, after that ground shall have been so regulated as that there shall be a gradual descent from the centre to the sides of the square formed by High and Chestnut, and Eleventh and Twelfth streets: all the outside foundation walls, forming the cellars, shall be three feet and six inches thick up to the first floor, or as high as may be necessary to fix the centres for the first floor; and the inside foundation wall, running north and south, and the three inside foundation walls, running east and west, (intended to receive the interior walls for the four rooms each not less than fifty feet square in the clear, above mentioned) shall be three feet thick up to the first floor, or as high as may be necessary to fix the centres for the first floor: when carried so far up, the outside walls shall be reduced to two feet in thickness, leaving a recess outside of one foot and inside six inches—and when carried so far up, the inside foundation walls shall also be reduced, six inches on each side, to the thickness of two feet; centres shall then be fixed on the various recesses of six inches throughout, left for the purpose, the proper arches shall be turned, and the first floor laid: the outside and the inside walls shall then be carried up of the thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the second

floor, that is the floor for the four rooms each not less than fifty feet square in the clear, and for the landing in the north, and the landing in the south, of the building, where the stairs are to go up—at this stage of the work, a chain, composed of bars of inch square iron, each bar about ten feet long, and linked together by hooks formed of the ends of the bars, shall be laid straitly and horizontally along the several walls, and shall be as tightly as possible worked into the centre of them throughout, and shall be secured wherever necessary, especially at all the angles, by iron clamps solidly fastened, so as to prevent cracking or swerving in any part: centres shall then be laid, the proper arches turned for the second floor and landings, and the second floor and landings shall be laid: the outside and the inside walls shall then be carried up of the same thickness of two feet throughout as high as may be necessary to begin the recess intended to fix the centres for the third floor and landings; and, when so far carried up, another chain similar in all respects to that used at the second story, shall be in like manner worked into the walls throughout as tightly as possible, and clamped in the same way with equal care; centres shall be formed, the proper arches turned, and the third floor landings shall be laid: the outside and the inside walls shall then be carried up, of the same thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the roof; and, when so carried up, a third chain, in all respects like those used at the second and third stories, shall in the manner before described be worked as tightly as possible into the walls throughout, and shall be clamped with equal care; centres shall now be fixed in the manner best adapted for the roof, which is to form the ceiling for the third story, the proper arches shall be turned, and the roof shall be laid as nearly horizontally as may be, consistently with the easy passage of water to the eaves: the outside walls, still

of the thickness of two feet throughout, shall then be carried up about two feet above the level of the platform, and shall have marble capping, with a strong and neat iron railing thereon: The outside walls shall be faced with slabs or blocks of marble or granite, not less than two feet thick, and fastened together with clamps securely sunk therein—they shall be carried up flush from the recess of one foot formed at the first floor where the foundation outside wall is reduced to two feet: The floors and landings as well as the roof shall be covered with marble slabs, securely laid in mortar; the slabs on the roof to be twice as thick as those on the floor. In constructing the walls, as well as in turning the arches, and laying the floors, landings, and roof, good and strong mortar, and grout, shall be used, so that no cavity whatever may any where remain. A furnace or furnaces for the generation of heated air shall be placed in the cellar, and the heated air shall be introduced in adequate quantity wherever wanted by means of pipes and flues inserted and made for the purpose in the walls, and as those walls shall be constructed. In case it shall be found expedient, for the purposes of a library or otherwise, to encrease the number of rooms by dividing any of those directed to be not less than fifty feet square in the clear, into parts, the partition walls to be of solid materials. A room most suitable for the purpose, shall be set apart for the reception and preservation of my books and papers, and I direct that they shall be placed there by my executors and carefully preserved therein. There shall be two principal doors of entrance into the college, one into the entry or hall on the first floor in the north of the building, and in the centre between the east and west walls, the other into the entry or hall in the south of the building, and in the centre between the east and west walls; the dimensions to be determined by a due regard to the size of the entire building, to that of the entry, and to the purposes of the doors. The necessity for, as well as the

position and size of other doors, internal or external, and also the position and size of the windows, to be, in like manner, decided on by a consideration of the uses to which the building is to be applied, the size of the building itself and of the several rooms, and of the advantages of light and air: there should in each instance be double doors, those opening into the rooms to be what are termed glass doors, so as to encrease the quantity of light for each room, and those opening outward to be of substantial wood work well lined and secured: the windows of the second and third stories I recommend to be made in the style of those in the first and second stories of my present dwelling house North Water street, on the eastern front thereof; and outside each window I recommend that a substantial and neat iron balcony be placed sufficiently wide to admit the opening of the shutters against the walls; the windows of the lower story to be in the same style, except that they are not to descend to the floor, but so far as the surbase, up to which the wall is to be carried, as is the case in the lower story of my house at my place in Passyunk township. In minute particulars, not here noticed, utility and good taste should determine. There should be at least four out-buildings, detached from the main edifice and from each other, and in such positions as shall at once answer the purposes of the institution, and be consistent with the symmetry of the whole establishment:—each building should be, as far as practicable, devoted to a distinct purpose: in that one or more of those buildings, in which they may be most useful, I direct my executors to place my plate and furniture of every sort. The entire square, formed by High and Chestnut streets, and Eleventh and Twelfth streets, shall be enclosed with a solid wall, at least fourteen inches thick and ten feet high, capped with marble and guarded with irons on the top so as to prevent persons from getting over: there shall be two places of entrance into the square, one in the centre of the wall facing High street,

and the other in the centre of the wall facing Chestnut street: at each place of entrance there shall be two gates, one opening inward and the other outward; those opening inward to be of iron and in the style of the gates north and south of my banking house, and those opening outward to be of substantial wood work well lined and secured on the faces thereof with sheet iron. The messuages now erected on the south-east corner of High and Twelfth streets, and on Twelfth street, to be taken down and removed, as soon as the College and out-buildings shall have been erected, so that the establishment may be rendered secure and private.

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture, and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution; the income issues and profits of so much of the said sum of two millions of dollars as shall remain unexpended shall be applied to maintain the said college according to my directions:

1. The institution shall be organized as soon as practicable, and, to accomplish that purpose more effectually, due public notice of the intended opening of the college shall be given—so that there may be an opportunity to make selections of competent instructors, and other agents, and those who may have the charge of orphans may be aware of the provision intended for them:

2. A competent number of instructors, teachers, assistants and other necessary agents, shall be selected and when needful their places from time to time supplied: they shall receive adequate compensation for their services: but no person shall be employed, who shall not be of tried skill in his or her proper department, of established moral character—and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken, in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars, useful to be known, of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian, or other competent authority, shall have given, by indenture, relinquishment, or otherwise, adequate power to the Mayor, Aldermen and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times priority of application shall entitle the applicant to preference in admission, all other things concurring: but, if there shall be at any time more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given,—first to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly to those born in the city of New York (that being the first port on the continent of North America, at which I arrived); and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.

7. The orphans, admitted into the College, shall be there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner: Due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation: They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (I do not forbid, but I do not recommend, the Greek and Latin Languages)—and such other learning and science, as the capacities of the several scholars may merit or warrant: I would have them taught facts and things, rather than words or signs: And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans, admitted into the college, shall, from malconduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars, who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the Mayor Aldermen and citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively; consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade, to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents: There are, however, some restriction, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: first I enjoin and require, that, if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof exclusively: secondly, I enjoin and require, that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college:— . . . In making this restriction, I do not mean to cast any reflection upon any sect or person whatsover; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitements, which clashing doctrines and sectarian controversy are so apt to produce; My desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the

scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

. . . If the income, arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the encrease of the number of orphans, applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill navigation company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say:

1. To lay out, regulate, curb, light and pave a passage or street, on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from

South or Cedar street, all along the east part of Water street squares, and the west side of the logs, which form the heads of the docks, or thereabouts; and to this intent to obtain such acts of Assembly, and to make purchases or agreements, as will enable the Mayor Aldermen and citizens of Philadelphia to remove or pull down all the buildings, fences and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue;—to fill up the heads of such of the docks as may not afford sufficient room for the said street;—to compel the owners of wharves to keep them clean and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon after a shower of rain,—to completely clean and keep clean all the docks within the limits of the city, fronting on the Delaware;—and to pull down all platforms carried out, from the east part of the city over the river Delaware, on piles or pillars.

2. To pull down and remove all wooden buildings, (as well those made of wood and other combustible materials as those called brick-paned or frame buildings filled in with bricks) that are erected within the limits of the City of Philadelphia—and also to prohibit the erection of any such buildings within the said city's limits at any future time.

3. To regulate, widen, pave, and curb Water street, and to distribute the Schuylkill water therein upon the following plan that is to say, . . . that Water street be widened east and west from Vine street all the way to South street, in like manner as it is from the front of my dwelling to the front of my stores on the west side of Water street, and the regulation of the curbstones continued at the same distance from one another, as they are at present opposite to the said dwelling and stores, so that the regulation of th said street be not less than thirty-nine feet wide, and afford a large and convenient foot-way, clear of obstructions and incumbrances of every nature,

and the cellar doors on which, if any shall be permitted, not to extend from the buildings on to the foot-way more than four feet; the said width to be encreased gradually, as the fund shall permit, and as the capacity to remove impediments shall encrease, until there shall be a correct and permanent regulation of Water street on the principles above stated, so that it may run north and south as strait as possible: That the ten feet middle alleys, belonging to the public, and running from the centre of the east squares to Front street, all the way down across Water street to the river Delaware, be kept open and cleansed as city property, all the way from Vine to South street—that such part of each centre or middle alley as runs from Front to Water street be arched over with bricks or stone, in so strong a manner as to facilitate the building of plain and permanent stone steps and plat-forms, so that they may be washed and kept constantly clean: and that the continuance of the said alleys, from the east side of Water street be curbed all the way to the river Delaware and kept open forever—. . . (I understand that those middle or centre alleys were left open in the first plan of the lots, on the east front of the city, which were granted from the east side of Front street to the river Delaware, and that each lot on said east front has contributed to make those alleys by giving a part of their ground in proportion to the size of each lot; those alleys were in the first instance, and still are, considered public property, intended for the convenience of the inhabitants residing in Front street to go down to the river for water and other purposes; but, owing to neglect or to some other cause, on the part of those, who have had the care of city property, several encroachments have been made on them by individuals, by wholly occupying or building over, them, or otherwise, and in that way the inhabitants, more particularly those who reside in the neighborhood, are deprived of the benefit of that wholesome air, which their opening and cleansing throughout would afford): That the iron pipes, in Water

street, which, by being of smaller size than those in the other streets, and too near the surface of the ground, cause constant leaks, particularly in the winter season, which in many places render the street impassable, be taken up and replaced by pipes of the same size quality and dimensions in every respect, and laid down as deeply from the surface of the ground, as the iron pipes, which are laid in the main streets of the City: . . . and as it respects pumps for Schuylkill water and fire-plugs in Water street, that one of each be fixed at the south-west corner of Vine and Water streets, and so running southward, one of each near the steps of the centre alley going up to Front street; one of each at the south-west corner of Sassafras and Water streets, one of each near the steps of the centre alley going up to Front street, and so on at every south-west corner of all the main streets and Water street, and of the centre alleys of every square, as far as South or Cedar street; and when the same shall have been completed, that all Water street shall be repaved by the best workmen in the most complete manner, with the best paving water-stones, after the height of the curbstones shall have been regulated throughout, as well as the ascent and descent of the street, in such manner as to conduct the Water through the main streets and the centre alleys to the river Delaware, as far as practicable; and whenever any part of the street shall want to be raised, to use nothing but good paving gravel for that purpose, so as to make the paving as permanent as possible: . . . By all which improvements, it is my intention to place and maintain the section of the city above referred to in a condition which will correspond better with the general cleanness and appearance of the whole city, and be more consistent with the safety, health, and comfort of the citizens. And my mind and will are, that all the income, interest and dividends of the said capital sum of five hundred thousand dollars shall be yearly and every year expended upon the said objects, in the order in which I have stated them as closely as pos-

sible, and upon no other objects until those enumerated shall have been attained: and, when those objects shall have been accomplished, I authorize and direct the said The Mayor Aldermen and Citizens to apply such part of the income of the said capital sum of five hundred thousand dollars as they may think proper to the further improvement, from time to time, of the eastern or Delaware front of the City.

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purposes of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect, the several improvements above specified; namely, 1. laws, to cause Delaware avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing to be abated and removed; and to prohibit the erection of any such obstructions to the eastward of said Delaware avenue; 2. laws, to cause all wooden buildings as above described to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. laws, providing for the gradual widening, regulating, paving, and curbing of Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects, may, I persuade myself, be accomplished on principles at once just into relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same

in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund:—

1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen really suited to the purpose; and to this end, I recommend a division of the city, into watch districts or four parts, each under a proper head, and that at least two watchmen shall in each round or station patrol together.

3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it:

To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year, for ever—after providing for the College as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation, excepting however, the rents issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of

the XXIst clause of this will: And, if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall for the term of one year, from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give devise and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the College as aforesaid) to the United States of America for the purposes of internal navigation and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to The Mayor, Aldermen and Citizens of Philadelphia, are made upon the following express conditions, that is to say—First, that none of the monies, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever than those herein mentioned and appointed:—Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned, that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the

same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January, annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

XXV. And whereas I have executed an assignment in trust of my banking establishment, to take effect the day before my decease, to the intent that all the concerns thereof may be closed by themselves, without being blended with the concerns of my general estate, and the balance remaining to be paid over to my executors: Now, I do hereby direct my executors, hereinafter mentioned, not to interfere with the said trust in any way except to see that the same is faithfully executed, and to aid the execution thereof by all such acts and deeds as may be necessary and expedient to effectuate the same, so that it may be speedily closed, and the balance paid over to my executors, to go, as in my will, into the residue of my estate: And I do hereby authorise direct and empower the said trustees from time to time, as the capital of the said bank shall be received, and shall not be wanted for the discharge of the debts due thereat, to invest the same in good securities in the names of my executors, and to hand over the same to them, to be disposed of according to this my will.

XXVI. Lastly—I do hereby nominate and appoint Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, . . . executors of this my last will and testament: I recommend to them to close the concerns of my estate as expeditiously as

possible, and to see that my intentions in respect to the residue of my estate are and shall be strictly complied with; and I do hereby revoke all other wills by me heretofore made.

In witness, I, the said Stephen Girard have to this my last will and testament, contained in thirty-five pages, set my hand at the bottom of each page, and my hand and seal at the bottom of this page; the said will executed, from motives of prudence, in duplicate, this sixteenth day of February, in the year one thousand eight hundred and thirty.

STEPHEN GIRARD. (SEAL).

Signed, sealed, published, and declared by the said Stephen Girard, as and for his last will and testament, in the presence of us, who have at his request hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, February 16, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
S. H. CARPENTER.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will, now I do hereby republish the foregoing last will and testament dated February 16, 1830, and do confirm the same in all particulars: In witness, I the said Stephen Girard set my hand and seal hereunto the twenty-fifth day of December eighteen hundred and thirty.

Stephen Girard. (seal)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament in the presence of us, who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, Decr 25, 1830.

John H. Irwin,
Saml. Arthur,
Jno. Thomson.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel-Hall, on the Ridge Road in Penn Township, now I declare it to be my intention and I direct that the Orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose exclusively in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said Orphan Establishment prescribed by my said will as to said square shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently the said square of ground is to constitute and I declare it to be a part of the residue and remainder of my real and personal estate and given and devised for the same uses and purposes as are declared in section XX. of my will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said XXth section: In witness whereof I, the said Stephen Girard set my hand and seal hereunto the twentieth day of June eighteen hundred and thirty-one.

STEPHEN GIRARD. (SEAL)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament and a further direction in relation to the real estate therein mentioned, in the presence of us who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, June 20, 1831.

S. H. CARPENTER,
L. BARDIN,
SAML. ARTHUR.

Philadelphia, December 31, 1831. Then personally appeared Saml. Arthur and S. H. Carpenter two of the Witnesses to the foregoing Will and the second Codicil or republication thereof and on their Oaths did say that they were present and did see and hear Stephen Girard the Testator in the said Will and second republication thereof named, sign seal publish and declare the same as & for his last Will and Testament and republication thereof and that at the doing thereof he was of sound mind memory and understanding to the best of their knowledge and belief—And at the same time appeared Jno. Thomson, one of the Witnesses to the first republication of said will, and on his solemn affirmation did say that he was present, and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament and the said Samuel Arthur, another of the witnesses to said republication of said will on his oath did further say that he was present and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament,

and they both did say that at the doing thereof he was of sound mind, memory and understanding; to the best of their knowledge and belief.

CORAM,

J. HUMES,

Register.

December 31, 1831. Timothy Paxson and Thomas P. Cope, two of the Executors, affirmed—and Joseph Roberts, William J. Duane, and John A. Barclay the other Executors sworn and Letters Testamentary were granted unto them.

APPENDIX B.

Pennsylvania Act of March 24, 1832, P. L. 176 (1831-1832 Volume).

AN ACT

To enable the Mayor, Aldermen, and citizens of Philadelphia to carry into effect certain improvements, and execute certain trusts.

WHEREAS, By the last will and testament of Stephen Girard, late of the city of Philadelphia, deceased, the sum of five hundred thousand dollars is bequeathed to the mayor, aldermen, and citizens of Philadelphia, in trust among other things, to apply the income thereof "first, to lay out, regulate, curb, light and pave a passage or street on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue; extending from South or Cedar Street, all along the east part of Water street squares, and the west side of the logs which form the heads of the docks, or thereabouts; and to this intent, to obtain such acts of assembly, and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, to fill up the heads of such of the docks as may not afford sufficient room for the said street, to compel the owners of wharves to keep them clean, and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon, after a shower of rain, to completely clean, and keep clean, all the docks within the limits of the city, fronting on the Delaware; and to pull down all platforms carried out from the east part of the city, over the river Delaware, on piles or pillars." "Sec-

ond, To pull down and remove all wooden buildings, as well as those made of wood and other combustible materials as those called brick-paned, or framed buildings, filled in with bricks, that are erected within the limits of the city of Philadelphia; and also to prohibit the erection of any such building within the said city's limits at any future time." "Third, to widen, pave, and curb Water street, and to distribute the Schuylkill water therein, upon" a certain plan therein set forth. Now, for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That it shall and may be lawful for the mayor, alderman and citizens of Philadelphia, by ordinance lawfully enacted, or the intervention and act of authorized officers or agents, to lay out, regulate, curb, light, and pave a passage or street, not less than twenty-one feet in width, on the east part of the city of Philadelphia, fronting the river Delaware, at such distance or distances in the several parts thereof from the eastern line of Water street as they shall judge proper, extending from Vine to Cedar street, to be called the Delaware Avenue; and that, having laid out such street, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 2. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, in manner aforesaid, to lay out Water street, in the said city, anew, in

such manner as that the same shall be as nearly straight as conveniently may be, and of a uniform, or as near as may be uniform width throughout, not less than thirty-nine feet, if practicable, and the same to open and keep open for ever, as a common and public highway; and that having laid out said Water street of such increased width, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 3. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, or take other measures for regulating, adjusting, and determining the easternmost line to which wharves may thereafter lawfully be constructed on the river Delaware, fronting said city, and to cause a record of such regulated line to be made in the court of Quarter Sessions for the county of Philadelphia; to fix and decide on, or cause their officers to fix and decide on the levels of all wharves fronting the said city, and to declare the regulation thereof; to require the owners thereof to pave the same or to lay them with gravel, according to such regulation, so as effectually to drain and pass off the water from the same, and to require all persons owning and occupying or using docks or wharves, to cleanse the same and to keep the same in repair, and to prescribe the form, materials, and character of workmanship of all wharves hereafter to be constructed, and to require all platforms now projecting into the river Delaware, and supported on piles, pillars or piers, to be removed, and to prohibit the construction, in future, of any such projecting platforms; and to require the removal, and prohibit the construction, in future, of all buildings, fences, and other obstructions, to the eastward of Delaware Avenue, above mentioned, and to declare all erections and constructions whatsoever, contrary to the said ordinances, whether erected before or after the passage of the same to be nuisances, and generally to devise, ordain and execute whatever other things shall by them, the said mayor, alder-

men, and citizens of Philadelphia aforesaid, be deemed necessary or convenient for the good arrangement, security and government of the said wharves: *Provided,* That the easternmost line of the said wharves shall not be held to be finally determined, and the record thereof shall not be made, as aforesaid, unless the board of wardens, of the port of Philadelphia, shall decide and make their certificate in writing, that such easternmost line is not inconsistent with the public interests, which certificate shall also be recorded in the said court of Quarter Sessions; but if the said certificate shall not be granted by them, within three months after application made therefor, the refusal or omission of the said board of wardens to grant such certificate, shall, when duly verified by affidavit, be esteemed the judgment and decision of the said board of wardens, that such easternmost line is inconsistent with the public interests, and in case such a decision shall in any wise be made, an appeal shall lie therefrom to the said court of Quarter Sessions, as in other cases, and the judgment of the said court, in favor of such regulated line, shall be, for all purposes, equivalent to a similar decision by the said board of wardens: *Provided,* That nothing herein contained shall be construed to give authority to any one to erect wharves, or piers, extending out as far as the said regulated easternmost line, without license from the said board of wardens, as heretofore.

SECT. 4. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, prohibiting the construction within the said city, or any parts thereof, of all framed or brick-paned or other buildings, the walls whereof are not wholly composed of incombustible materials, determining the thicknesses of which walls of buildings of different dimensions and character shall hereafter be made in the said city, and in making all such other legal provisions as they shall think expedient

for preventing the extension of injuries from fire, in the said city, and to declare all buildings, the walls whereof are not wholly composed of incombustible materials, to be nuisances.

SECT. 5. *And be it further enacted by the authority aforesaid,* That when any of the said ordinances shall have been passed, or other proceedings had in relation to the said Delaware Avenue and Water street, or either of them, and the record thereof shall have been made as aforesaid, it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to proceed, from time to time, to open for public use, any part or parts thereof, and the same to keep open as common and public highways forever; and to that end, to enter upon such property as may be found to be within the same, construct wharves extending into the river, within the lines of said Delaware Avenue, and to a reasonable distance beyond the same, and fill up all docks within the limits thereof, and remove all obstructions, of whatever kind, from within the limits of said avenue and street, or any parts thereof, and level, drain, pitch, and pave the same, as other streets in the said city. And from and after the passing of such ordinances, and the record of the said avenue and street, all buildings, thereafter erected or rebuilt on the said avenue and street shall conform to the recorded limits of the same, and the mayor, aldermen and citizens of Philadelphia aforesaid, may pass ordinances, declaring all obstructions within the same to be nuisances.

SECT. 6. *And be it further enacted by the authority aforesaid,* That it shall at all times be lawful for the mayor, aldermen and citizens of Philadelphia, aforesaid, to remove and abate any building, erection or obstruction whatever, which, by this act, or by any ordinance to be hereafter passed by virtue of it, may be declared a nuisance: *Provided,* That if such building, erection or obstruc-

tion shall have been in existence at the time of the passage of this act, or of such ordinance passed by virtue hereof, the mayor, aldermen and citizens aforesaid shall give at least three months notice of their intention to remove the same to the persons having the ownership, occupation or use thereof, or in case no such persons shall be known to them, then they shall affix a copy of such notice to and upon such building, erection or obstruction, three months before proceeding to remove the same.

SECT. 7. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the said the mayor, aldermen and citizens of Philadelphia, aforesaid, to provide for the punishment of any person or persons who shall commit any nuisance contrary to the intent and meaning of this act, and of the ordinances which may be passed by virtue thereof, and of any person or persons who having committed any such nuisance, shall, after notice, refuse or neglect to remove the same.

SECT. 8. *And be it further enacted by the authority aforesaid,* That all persons whatsoever who shall receive damage to their property by reason of any thing which shall have been done by the mayor, aldermen and citizens of Philadelphia, under this act, or any ordinances passed by virtue hereof, may, after ten days notice of such their intention, to the mayor, aldermen and citizens aforesaid, apply by petition in writing, to the court of Quarter Sessions for the county of Philadelphia, who shall thereupon appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting, given as aforesaid; and shall be sworn or affirmed to inquire what damages the petitioners, or any of them, have sustained by reason of any thing so done, considering as well the advantages which may accrue to such petitioners as the injuries by them complained of, and the said jury having viewed the

premises and heard the parties, or their counsel, shall report in writing, under the hands of at least ten jurors, and their report having been considered and confirmed by the court, the damages thereby found shall be paid by the mayor, aldermen and citizens aforesaid, in six months after the confirmation of the said report.

SECT. 9. *And be it further enacted by the authority aforesaid,* That if the mayor, aldermen, and citizens aforesaid, shall deem it expedient that the damages should be legally ascertained before proceeding to enter on premises for the purpose of removing obstructions, and before appropriating to public use any property of individuals, or otherwise injuriously affecting the rights and interests of any proprietor, the mayor, aldermen and citizens aforesaid may, from time to time apply to the court of Quarter Sessions for the county of Philadelphia, by petition, in writing, specifying therein as nearly as may be the persons and property in regard to which they desire that the damages should be ascertained, and thereupon the said court shall appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting given to the owners or occupiers of the property, and shall be sworn or affirmed, as is provided in the foregoing section of this act, and having viewed and heard, as is therein provided, shall report in writing, under the hands of at least ten jurors, specifying in their said report as well the causes for which damages, if any should be paid, as the amounts of such damages, and in such case the mayor, aldermen and citizens aforesaid may, within one year after the confirmation of such report by the court of Quarter Sessions, tender to any owner of property named therein, the amount of damages thereby found in his favor, or may pay the same into court, for his use and benefit, and may thereafter proceed to enter upon the premises, and remove the obstructions, or appropriate the property for which dam-

ages shall have been so paid or tendered, first giving three months notice to the tenant in possession, if any: *Provided however,* That if the amount so found by such jury in favor of any owner, shall not be so tendered or paid within one year after the confirmation of such report, then the proceedings had upon the said petition of the mayor, aldermen, and citizens aforesaid, shall, so far as relates to the said owner, be null and void, and the mayor, alderman, and citizens aforesaid, may thereafter present their petition in writing anew, under this section, as if no proceedings had before been had: *And provided also,* that when a report shall have been made by a jury, under the provisions of this section, and damages shall have been tendered or paid, in accordance therewith, if thereafter any other damage than that reported on shall be sustained, the party aggrieved may thereafter apply, in regard to such other damages, for a jury to assess the same, under the eighth section of this act: *Provided further,* That it shall at all times be competent to the mayor, aldermen, and citizens aforesaid, to agree with any owner or owners of property, so to be taken, removed, or affected for the damages thereby to be occasioned, and such agreement shall be instead of any of the proceedings detailed in this or the foregoing sections of this act: And, forasmuch as in the course of time it may appear that powers are not vested in the said the mayor, aldermen, and citizens of Philadelphia which may be yet required to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

SECT. 10. *Be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and con-

venient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 11. *And be it further enacted by the authority aforesaid,* That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the select and common councils of the city of Philadelphia.